Supreme Court, U.S.
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No. 04-3

IN THE

Supreme Court of the United States

MICHAEL BOROWIEC, ET AL.,

Petitioners,

v.

GATEWAY 2000, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In enacting the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 *et seq.*, Congress delegated express authority to the Federal Trade Commission ("FTC") to carry out Congress' intent and to formulate policies and rules to effectuate the Magnuson-Moss' regulatory scheme. In doing so, the FTC promulgated regulation barring warrantors from including binding arbitration clauses in their warranties. 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999). Congress intended that the obligation to participate in arbitration would not foreclose a consumer's eventual access to the courts to press a claim for warranty breach. This regulation was disregarded by the Illinois Supreme Court in contravention to this Court's recent opinion in *Household Credit Services, Inc. v. Pfenning*, 541 U.S. ___, 124 S. Ct. 1741 (April 21,2004), where this Court held that the *Chevron* test must be followed and where Congress has left gaps for the agency to fill, the agency's regulations must be given controlling weight unless the interpretations are arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,843-44 (1984). Nevertheless, in contrast to the Supreme Court of Mississippi in *Parkerson v. Smith*, 817 So.2d 529 (2002), a divided panel of the Illinois Supreme Court, rejected the FTC's regulation and decided that the Magnuson-Moss Warranty Act did not preclude binding arbitration. The question presented for review is:

Whether the Supreme Court of Illinois improperly substituted its own interpretation of the Magnuson-Moss Warranty Act, in violation of *Household* and *Chevron*, instead of giving controlling weight to the FTC's regulation that the Warranty Act prohibits warrantors from requiring consumers to resort to binding arbitration.

Parties To The Proceedings Below

In addition to the parties identified in the caption, Dorota Kobik, Tadeusz Kobik, and Leslie Waldron, were parties to the proceedings below and join in this Petition for Certiorari.

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The Illinois Supreme Court's Opinion is reported at *2004 Ill. Lexis 675*. The Court of Appeal's opinion is reported at *331 Ill.App.3d 842* (2002).

Jurisdiction

The Illinois Supreme Court entered its judgment on April 1, 2004.

Statutes and Regulations Involved

This case involves the following provisions of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, *15 U.S.C. § 2301 et seq.*

16 C.F.R. § 700.8.

> A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract. Nor shall a warrantor or service contractor state that it alone shall determine what is a defect under the agreement. Such statements are deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contract.

15 U.S.C. § 2310(a)(1), (2).

> (a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures.
>
> (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.
>
> (2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement

procedure which is incorporated into the terms of a written warranty to which any provision of this title [15 USCS §§ 2301 et seq.] applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

16 C.F.R. § 703.5(g)(1)

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that:

(1) If he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

16 C.F.R. § 703.5(j)

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a) (3) of the Act.

15 U.S.C. § 2310(a)(2)

The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title [15 USCS §§ 2301 et seq.] applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

Statement of the Case

A divided panel of the Illinois Supreme Court invalidated an important provision of the Magnuson-Moss Warranty Act *15 U.S.C. § 2301 et seq.* as implemented by the Federal Trade Commission ("FTC") in *16 C.F.R. § 703.* The Magnuson-Moss Warranty Act as interpreted by the FTC allows for warrantors to require a consumer to submit to informal dispute settlement procedures or mechanisms provided that, if the consumer is dissatisfied with the outcome of the procedure, the consumer may pursue a legal remedy. The decision below raises a question of federal law and is of exceptional importance to consumers and the FTC's ability to promulgate and effectuate the Magnuson-Moss Warranty Act's regulatory scheme. Further, the opinion reflects a conflict between state courts of last resort that have decided this important federal question. *See Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002).

A. The Relevant Statutes and Regulations

The issue in this case is whether the Illinois Supreme Court was required to defer to the interpretation of the Magnuson-Moss Warranty Act expressed in the contemporaneous legislative regulations of the FTC, promulgated after formal rulemaking proceedings and in accordance with the procedures established by Congress, and consistently applied for 29 years by that agency, and to therefore enforce those rules in this case by finding that the binding arbitration clause is illegal. Although a warrantor may, if it elects to do so, include a provision requiring a consumer to pursue informal dispute resolution procedures before filing suit, *16 C.F.R. § 703.5(g)(1)* requires that any such mechanism inform consumers that if they are dissatisfied with the outcome of the procedures, they may pursue legal remedies and that "[d]ecisions of the [m]echanism shall not be binding on any person." *Id. at § 703.5(j).* Rule 703 has been interpreted by the FTC to prohibit the use of binding arbitration clauses in written warranties. *See 64 Fed.Reg. at 19708* (discussing Rule 703's prohibition against binding arbitration clauses in written warranties). The FTC has noted that reference within the written warranty to any binding non-judicial remedy is prohibited by the Rule and the Act. *Wilson v. Waverlee Homes, Inc., 954 F.Supp. 1530, 1537-40 (M.D.Ala.1997), aff'd, 127 F.3d 40 (11th Cir.1997).*

Congress, pursuant to an express delegation of rulemaking authority in *15 U.S.C. §§ 2309-2310*, gave the FTC the power to make legislative and interpretive regulations. *15 U.S.C. § 2310(a)(2)* states that "[t]he Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies."[1] [T]he Commission determined that "reference within the written warranty to any binding, non judicial remedy is prohibited by the Rule and the Act." The Commission believes that this interpretation continues to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration. *64 Fed. Reg. 19700, 19708-19709.*

This Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) decided that "[t]he power of an administrative agency to administer a congressionally created... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *(citation to Morton v. Ruiz, 415 U.S. 199, 231 (1974))*. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron, 467 U.S.* at 843-844. In *Household Credit Services, Inc v. Pfenning, 541 ____ (April 21, 2004)*, this Court held that the *Chevron* principles applied to the Federal Reserve Board's interpretation of the Truth in Lending

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[1] The interpretive regulations, found at 16 C.F.R. § 700, also bar binding arbitration. See 16 C.F.R. § 700.8. They are not entitled to the same level of *Chevron* deference. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). They are "entitled to respect," provided they "have the power to persuade," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), which they do here.

Act. This Court concluded that the agency's decision should be given controlling weight and that "Judges ought to refrain from substituting their own interstitial lawmaking for the [Board]." *Id. Citing Ford Motor Credit Co., 444 U.S at 568.*

B. Proceedings in the Circuit Court

Petitioners purchased Gateway personal computers manufactured by Gateway which were accompanied by Gateway's limited written warranty that promised that the computer's hardware systems would be free from defects in materials and/or workmanship during the warranty period. Incorporated into Gateway's written warranty was an arbitration clause which provided that all matters will be submitted to the National Arbitration Forum ("NAF") and those decisions will be "final and binding." Petitioners experienced several defects in their computers and notified Gateway on numerous occasions to repair the computer. Despite a number of reasonable attempts to cure these defects, Gateway failed to repair the defects or replace the computers as provided in the written warranty. As a result of these defects, Petitioners revoked acceptance of the computers in writing and filed four (4) count complaints against Gateway alleging violations of the Magnuson-Moss Warranty Act ("Magnuson-Moss"), violation of the Consumer Fraud and Deceptive Business Practices Act and the commission of common law fraud. As to each Petitioner, Gateway filed its Motion to Dismiss for lack of subject matter jurisdiction and to compel arbitration pursuant to Section 2-615 of the Illinois Code of Civil Procedure. The Circuit Court of Cook County, Illinois denied Gateway's Motions to Dismiss and found that the Warranty Act did not allow for binding arbitration.

C. Proceedings in the Court of Appeals

The Illinois Court of Appeals affirmed the Circuit Court's judgment denying Gateway's motion to dismiss or compel arbitration. *See Borowiec v. Gateway 2000, Inc.* 331 Ill. App. 3d 842, 772 N.E.2d 256 (1st Dist. Ill. May 31, 2002) The court held that in cases of consumer transactions, Congress had overridden the Federal Arbitration Act through the Magnuson-Moss Warranty Act *15 U.S.C. § 2301 et seq* (1994) and the regulations adopted by the

FTC pursuant to the Act prohibited the type of binding arbitration provisions contained in Gateway's warranties. Therefore, the court concluded that the arbitration provisions were unenforceable. Consistent with that conclusion, the court found that arbitration provisions cannot operate as a bar to the consumers' claim in the Circuit Court and affirmed the decision of the Circuit Court.

D. Proceedings in the Supreme Court of Illinois

A divided panel of the Supreme Court of Illinois reversed the judgments of the Appellate and Circuit Courts. In reaching its decision the court failed to give the regulations of the FTC controlling weight and disregarded the regulations. The court opined that binding arbitration is not part of informal dispute settlement procedure, thereby falling outside the bounds of the Magnuson-Moss Warranty Act and so there is no congressional intent to prevent binding arbitration. *Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 475-76 (5th Cir. 2002)* The court also relied on *Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1276 (11th Cir. 2002)* which held that the text of the Magnuson-Moss Act does not expressly bar binding arbitration, nor did Congress express a clear intent to bar arbitration in the Magnuson-Moss Act's legislative history. Unlike the *Walton* case, the *Davis* court did an analysis of the reasonableness of the FTC's construction of the statute. The court concluded that the motives behind the FTC's regulations were unreasonable. *Davis, 305 F.3d at 1280.*

In following the courts' opinions in *Walton* and *Davis*, the Illinois Supreme Court failed to do the *Chevron* analysis. As recognized most recently by this Court, in determining what effect a court must give to the FTC's regulations, a court must first determine whether "Congress has directly spoken to the precise question at issue." *Household*, 541 U.S. ___ at *5[2] citing *Chevron*,

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[2] In *Household*, this Court overturned a Sixth Circuit Court of Appeals' decision wherein the Sixth Circuit declined to follow a regulation imposed by the Federal Reserve Board interpreting the Truth in Lending Act. *Id.* In reversing the Circuit Court, the Supreme Court admonished the Sixth Circuit by noting, "In holding that Regulation Z conflicts with § 1605's definition of the term 'finance charge,' the Court of Appeals ignored our warning that 'judges ought to refrain from

467 U.S. at 842. "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Household* at *5 quoting *Chevron* at 842. "However, whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household* at *5 quoting *Chevron* at 842. The Illinois Supreme Court failed to apply the *Chevron* analysis and hence the decision it reached was erroneous and needs to be reversed.

Justice Kilbride of the Illinois Supreme Court dissented in *Borowiec*, and demonstrated that a proper application of statutory construction would have required the Illinois Supreme Court to determine if the FTC's regulation was "arbitrary, capricious, or manifestly contrary to the statute." Justice Kilbride correctly noted the following:

> In rejecting the FTC's regulations interpreting the Magnuson-Moss Act, the majority relies heavily on both *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002) (slip op. at 10-13) and *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002) (slip op. at 13-15). I cannot agree with the majority's approach to these cases.
>
> * * *
>
> In the instant case, I believe the majority has unwisely chosen to follow the *Walton* court's erroneous conclusion on prong one of the *Chevron* test. Slip op. at 10 (finding the *Walton* analysis "particularly helpful"). The *Walton* court held that Congress had spoken directly to the precise issue of whether binding arbitration provisions are permissible in consumer product warranties. *Walton*, 298 F.3d at 478 (stating that "the clear congressional intent in favor of enforcing valid arbitration agreements

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substituting their own interstitial lawmaking for that of the [Board].'" *Household* at *10 quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 555, 568 (1980).

controls in this case"). That mistaken conclusion, in turn, obviated the need to reach the second prong of the *Chevron* analysis and, thus, to address the reasonableness of the FTC's interpretation. *Walton*, 298 F.3d at 478 n.14.

The *Walton* court's error is apparent from both the text and the legislative history of the Magnuson-Moss Act. Notably, the text of the Act is completely silent concerning its interaction with the Arbitration Act in consumer warranty cases. *Walton*, 298 F.3d at 475 (acknowledging that the text did not address the permissibility of binding arbitration clauses in consumer warranties). Under the *Chevron* analysis, if the statute is silent on a given issue, we must next consider whether the agency's construction of the statute is permissible. *Chevron*, 467 U.S. at 843, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782. Thus, since the statute itself is silent on the precise question at issue here, the *Walton* court should have proceeded to prong two of the analysis. At best, the statute's silence necessarily creates a strong ambiguity regarding Congress' true intent on this issue. By overlooking the absence of any language in the Magnuson-Moss Act directly addressing its potential conflict with the Arbitration Act and rushing headlong to the conclusion that Congress has directly spoken on this precise question, *the majority in both Walton and this case ignore the express directive of the Supreme Court established in the Chevron test.* Since the Magnuson-Moss Act is undisputedly silent on this issue, this court should proceed with an analysis of prong two of the *Chevron* test and consider whether the FTC's regulations are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782.

Borowiec, at *38-39, *40-42 (emphasis added).

Since the Illinois Supreme Court in *Borowiec* did not determine that the FTC's regulation was "arbitrary, capricious, or manifestly contrary" to the Magnuson-Moss Warranty Act, the Illinois Supreme Court's analysis was incomplete. In the absence of such a finding, the Illinois Supreme Court per *Household* and *Chevron*, was required to defer to the FTC and to give controlling weight to the FTC's regulations. *Household* at *5 quoting *Chevron* at 842. As such, Petitioners pray that this Court reverse the Illinois Supreme Court's decision based on its failure to conform to this Court's directive in *Chevron* and *Household*.

As the other dissent in *Borowiec*, Justice Rarick of the Illinois Supreme Court noted:

> I agree with those courts which have held that the Magnuson-Moss Warranty Act supersedes the Federal Arbitration Act in cases seeking relief based on warranties encompassed by the Magnuson-Moss Warranty Act's provisions.
>
> The regulations enacted by the FTC in accordance with the authority conferred on them by Congress are consistent with that view . . . . I reject the notion that the FTC's regulations are not entitled to deference and should be ignored by our court in analyzing the validity of the binding arbitration clause in Gateway's warranties. Such an approach is inconsistent with federal law. The United States Supreme Court has expressly held that the legislative regulations adopted by federal administrative agencies are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute pursuant to which they were adopted. *Chevron USA., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 843-844 (1984).* The regulations here do not fall within any of those exceptions.

Borowiec, at *80-81.

Justice Rarick concluded:

> For a state court to override such regulations would violate the supremacy clause of the United States Constitution.

Borowiec, at *80-81 citing *Boron Oil Co. v. Downie*, *873 F. 2d 67,71 (4th Cir. 1989)*.

Reasons for Granting the Petition Pursuant to Supreme Court Rule 10(b) and 10(c)

This Court should grant Certiorari as this Petition meets the requirements of Supreme Court Rule 10(b) and 10(c). The Illinois Supreme Court's decision conflicts with the decision of the state court of last resort in Mississippi involving a matter of federal law. *See Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002). The Mississippi Supreme Court in *Parkerson* reached the opposite conclusion of the Illinois Supreme Court in *Borowiec*. Specifically, the court in *Parkerson* determined that pursuant to *Chevron* it was required to defer to the regulations of the FTC, and as such, the *Parkerson* court held that the Magnuson-Moss Warranty Act precludes enforcement of binding arbitration agreements in regards to written or implied consumer warranties. *Id.* at 535.

Additionally, this Court should grant Certiorari as this Petition meets the requirements of Supreme Court Rule 10(c) as it involves an important question of federal law that should be settled by this Court. It also involves a violation of the Supremacy Clause as a state court of last resort disregarded the regulations of a federal agency with respect to the interpretation of a federal statute without applying the *Chevron* test.

Pursuant to this Court's recent decision in *Household* and previous decision in *Chevron*, the Illinois Supreme Court was required to follow the FTC's regulations absent a finding that the regulation was "arbitrary, capricious, or manifestly contrary" to the Warranty Act. The court was also required to defer to federal

regulations pursuant to the Supremacy Clause of the United States Constitution.[3]

Pursuant to the express language of the Magnuson-Moss Warranty Act, Congress empowered the FTC to promulgate rules for determining several issues under the Act. In addition to 15 U.S.C. § 2312 (c) which provided the FTC with the general authority to "promulgate rules" for the implementation of the Act, section 2310 (a)(2) provided the FTC with the specific authority to promulgate certain "minimum requirements" that a warrantor's Informal Dispute Resolution ("IDR") program must meet before a warrantor may require an aggrieved consumer to resort to IDR as a prerequisite to legal action. 15 U.S.C. § 2310(a)(2). These regulations were designed to ensure that IDR programs "not only look good on paper, but function effectively and fairly in practice" and that a given IDR mechanism "is fair and effective so that it does not just represent another hurdle that the consumer is forced to surmount before being provided a meaningful avenue of redress." 93 Cong. Rec. 40711, 40712 (Dec. 18, 1974).

Under the Act's express delegation of rulemaking authority, the FTC, which had assisted Congress for six years in the development of the Act, began a formal rulemaking proceeding in 1975 that entailed hearings and the receipt of data and written submissions from interested persons. "[I]ndustry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration)." 40 Fed. Reg. 60167, 60210 (Dec. 31, 1975). On the basis of the congressional intent of the Act, and because it could not devise a way to allow binding arbitration provisions in time-of-sale warranties that would protect the interests of consumers, the FTC rejected industry's contentions, and promulgated legislative regulations that bar binding arbitration clauses in warranties accompanying the sale of consumer products.

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[3] The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." USCS Const. Art. VI, Cl 2.

16 C.F.R. §§ 703.5(g), 703.5(j); 40 Fed. Reg. 60167, 60210 (Dec. 31, 1975). The FTC reiterated its position in 1977 and 1999. The FTC allows warrantors to offer "a binding arbitration option to consumers after a warranty dispute has arisen." 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999). It bars only binding time-of-sale arbitration clauses contained in warranties.

The fact that the FTC has consistently opposed binding arbitration is also significant. While agency interpretations that are revised over time are certainly entitled to *Chevron* deference, *see Rust v. Sullivan*, 500 U.S. 173, 186 (1991), longstanding and consistent agency interpretations carry special weight. *See NLRB v. Bell Aerospace Co. Div. Textron, Inc.*, 416 U.S. 267, 274-274 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration."); *and see Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 740 (1996) (observing that "agency interpretations that are of long standing come before us with a certain 'credential of reasonableness' since it is rare that error would long persist"). Such a "credential of reasonableness" is especially applicable here since on April 22, 1999, the FTC reported on an extensive review of its regulations in the warranty field and it explicitly reaffirmed its position that the Magnuson-Moss Act prohibits binding arbitration. 64 Fed. Reg. 19700, 19708-19709 (April 22, 1999). The FTC further approved the decision in *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997), which held binding arbitration clauses in time-of-sale warranties illegal under the Act. 64 Fed. Reg. 19700, 19708 n. 72 (1999).

In its 1999 reaffirmation of its legislative rules, the FTC explained that it requested comments on its rules and guides interpreting and implementing the Magnuson-Moss Act "as part of a regulatory review program, under which it reviews rules and guides periodically in order to obtain information about the costs and benefits of the rules and guides under review, as well as their regulatory and economic impact." 64 Fed. Reg. 19700, 19700 (Apr. 22, 1999). "After careful review of the comments received in response" to its request, the FTC decided to retain the interpretations and rules without change. The FTC wrote:

> [T]he Commission determined that "reference within the written warranty to any binding, non judicial remedy is prohibited by the Rule and the Act." The Commission believes that this interpretation continues to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.

64 Fed. Reg. 19700, 19708-19709. The FTC said, like the court in *Wilson v. Waverlee*, that it was troubled by a statutory construction that "would enable warrantors and the retailers selling their products to avoid the requirements of the Warranty Act simply by inserting binding arbitration clauses in their sales contracts." 64 Fed. Reg. 19700, 19709 at n. 72.

The Illinois Supreme Court in determining what effect it should give to the FTC's regulations should have first determined whether "Congress has directly spoken to the precise question at issue." *Household*, 541 U.S. ___ at *5 citing *Chevron*, 467 U.S. at 842. "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Household* at *5 quoting *Chevron* at 842. "However, whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household* at *5 quoting *Chevron* at 842. Since Congress had not spoken to the precise issue before the Court, the Illinois Supreme Court should have completed the *Chevron* analysis. The court's failure to do so justifies reversal of the court's decision.

The question presented here warrants immediate review. By holding in contrast to the Supreme Court of Mississippi, the Illinois Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort. *See Parkerson v. Smith*, 817 So.2d 529 (2002). Moreover, by effectively not upholding the FTC's interpretation of the Magnuson-Moss Warranty Act regarding binding arbitration, the Illinois Supreme Court has undermined the Magnuson-Moss Act and also

denied an important right to consumers. Absent a ruling by this Court, every warrantor of consumer products will be free to insert a binding arbitration clause in their warranties and deny consumers a chance to litigate their claims if they are not satisfied with the decision of the arbitration.

Such an effect on consumers should not be taken lightly, especially where the Illinois Supreme Court did not engage in the requisite statutory construction analysis for interpreting federal law. As recognized on April 22, 2004 by this Court in *Household*, 541 U.S. ___, the Illinois Supreme Court should have engaged in a two (2) part statutory construction analysis before declining to follow the FTC's regulations. As the court neither concluded nor relied on authority that concluded that the FTC's regulations were "arbitrary, capricious, or manifestly contrary" to the intent of Congress in drafting the Warranty Act, the Illinois Supreme Court should be reversed for failing to give the regulations of the FTC controlling weight.

The Illinois Supreme Court's rejection of the FTC's interpretation will have a far reaching impact on the rest of the Magnuson-Moss Warranty Act, not only does it render a section of the Act meaningless, but it also will bring about different results in different areas of the country. This will create confusion and add to lack of uniformity in the meaning of warranties and what relief is available under the Warranty Act.

I. The Decision Below Is Contrary to the Supreme Court of Mississippi's Interpretation of the Same Federal Question and Contrary to the Federal Trade Commission's Regulations as to This Federal Question in Violation of *Household* and *Chevron* .

In light of this Court's recent decision in *Household*, it is apparent that the Illinois Supreme Court did not properly analyze this issue of statutory construction in contrast to the Supreme Court of Mississippi in *Parkerson*.

Even if one were to adopt the view that the Magnuson-Moss Act does not expressly preclude binding arbitration, it does not

follow that the FTC lacks the power to prohibit binding arbitration as it has. This Court in *Household* restated the *Chevron* holding that courts must first determine whether "Congress has directly spoken to the precise question at issue." *Household*, 541 U.S. ___, 124 S. Ct. 1741 (April 21, 2004) citing *Chevron*, 467 U.S. at 842 (1984) "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Household* at *5 quoting *Chevron* at 842. "However, whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household* at *5 quoting *Chevron* at 842.

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 843-844. The *Chevron* court quoted from its decision in *United States v. Shimer*, 367 U.S. 374, 383 (1961), while making it clear that in a case like this a court is required to defer to the FTC's expertise regarding the most appropriate way to effectuate the consumer protection goals of a statute such as Magnuson-Moss:

> [T]he principle of deference to administrative interpretations "has been consistently followed by this Court whenever a decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.
>
> "... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Chevron, 467 U.S. at 844-845, *quoting United States v. Shimer*, *supra*, at 367 U.S. 382383. This approach has been followed consistently by this Court. *See Rust v. Sullivan*, 500 U.S. 173, 189-190 (1991) ("It is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations."); *and see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke Law Journal 511, 512 (1989).

Petitioners maintain, first, that it is proper to review the FTC's regulations under the "arbitrary, capricious, or manifestly contrary to the statute" standard set forth in *Household* as pertaining to those statutes where the "power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules" to fill a gap left explicitly by Congress. *Chevron*, 467 U.S. at 843-844.

Here, we rely on the fact that "informal dispute settlement mechanisms" did have a meaning, in light of the statute's text taken as a whole, the legislative history, and the underlying statutory purposes, and its meaning encompassed all nonjudicial procedures including arbitration, and thus Congress' use of the language *explicitly* left a "gap" for the FTC to fill, specifically, the details of how *all such procedures* would operate in the specific context of consumer product warranties issued at the time of sale. There is nothing arbitrary or capricious in the FTC's 29 year history of effectuating the policies of Congress or in its legislative rules promulgated back in 1975.

Even assuming, *arguendo*, that Congress did not explicitly address the issue of binding arbitrations in this context, then Congress *implicitly* left a "gap" in how to deal with this problem, and its program of statutory protection for consumers requires the formulation of policy and the making of rules "to fill" this "gap." *See, e.g., Immigration and Naturalization Serv. v. Aguirre Aguirre*, 526 U.S. 415, 424 (1999).

The FTC, as we have noted, gave a two-part rationale for its legislative regulations that bar binding arbitration. First, it said that it was Congress' intent to prohibit them. But, it also said that, "even if

binding Mechanisms were contemplated by Section 110 of the Act," it could not determine a way to issue "any guidelines" permitting binding arbitration that "could ensure sufficient consumer protection for consumers." 40 Fed. Reg. 60167, 60210 (Dec. 31, 1975). In other words, the FTC believes (quite rightly) that it cannot effectively administer the program that *Congress required it to administer*, the program of guarding consumers' interests in the warranty field, unless it bars companies like Defendant from foiling its regulatory control by inserting binding arbitration provisions into their warranties, provisions that, *simply because they are binding*, extinguish the protections Congress supplied to consumers under the Act.

The FTC then is filling a "gap" in that it is formulating policy and promulgating rules that are "necessarily require[d]" to effectuate Congress' scheme of consumer protection in the warranty field. *Chevron*, 467 U.S. at 843-844. It cannot be contended that in doing so, the FTC has behaved unreasonably. Justice Souter explained that it can "be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which `Congress did not actually have an intent' as to a particular result." *United States v Mead Corp.*, 533 U.S. 218, 229 (2001), *quoting Chevron*, 467 U.S. at 845. *See also Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 481 (2001).

Justice Souter wrote that in such circumstances, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." *Id.* at 229. If the agency's interpretation is reasonable, then it must be enforced, regardless of whether the court would have reached a contrary result if it was the entity charged by Congress to formulate the policy for and to implement a statutory scheme. Petitioners maintain that this justifies reversing the Illinois Supreme Court. It is not correct for a court to supplant the agency's view in this case, on the basis of a mythic "congressional intent" derived from a law passed in 1925, before the age of mass-produced consumer products came into being, before the rise of warranties and guarantees as

mass-marketing devices emerged, and before the "warranty problem" of the 1950's and 1960's arose, a problem that prompted people like Warren Magnuson and Frank Moss to act to protect the American people. This is especially true in light of the fact that in the 1970's the FAA was not viewed in the same way it is today.[4] If it had been, perhaps Congress would have spoken about FAA-arbitration in explicit terms. As Justice Kennedy wrote in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999), "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect."

It is Gateway that contended the FTC's regulations were invalid, but Gateway did not meet *its burden* under *Chevron* or *Household*. As such, this Court should reverse the Illinois Supreme Court's decision.

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[4] In the 1970's FAA-governed arbitration was not in use as a means of resolving consumer claims. "Before the 1980's, the FAA was interpreted as applying only to federal question cases or diversity cases involving commerce that were in federal court. Further, the FAA applied only to cases that were in federal court on an independent federal question basis." Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under The Federal Arbitration Act*, 77 N. Carolina L. Rev. 931, 935 (1999). It was only in the last eighteen years that the Supreme Court of the United States began interpreting the FAA more broadly so as to promote its use in all forms of contractual relationships. *Id.* at 935-936, 943954. See also *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Perry v. Thomas*, 482 U.S. 483, 490-491 (1987). Courts that have placed emphasis on the fact that FAA arbitration was not mentioned by Congress, and that have drawn from this fact, the conclusion that, surely, Congress did not intend to interfere with the FAA when it enacted Magnuson-Moss have failed to grasp this essential point. A point that explains why when learned attorneys like Antonin Scalia, a future Justice of the U.S. Supreme Court, and Robert Braucher, then an Associate Justice of the Supreme Judicial Court of Massachusetts, issued in 1973 the National Institute for Consumer Justice's final report, *Redress of Consumer Grievances*, while they discussed private arbitration mechanisms, they did not discuss arbitration under the Federal Arbitration Act as a mechanism under which consumer warranty claims could be resolved.

II. The Question Presented Is Important And Warrants Immediate Review By This Court To Create Uniformity Amongst The State Courts Of Last Resort As To An Issue Of Federal Law.

As leading commentators have noted, issues involving "the validity of agency regulations under the statutes pursuant to which they were promulgated" are often sufficiently important to warrant this Court's Review. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.13, at 248 (8th ed. 2002). In fact, this Court has granted Certiorari in a number of cases that have raised the issue involving the validity of agency rules and regulations, even in the absence of a direct conflict among the circuits. *See, e.g., Pub. Lands Council v. Babbitt*, 529 U.S. 728,739 (2000) (reviewing decision that sustained regulations promulgated by the Secretary of Interior under the 1934 Taylor Grazing Act). Another case was the *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 375-77 (1999) (reviewing decision that invalidated federal Communication Commission rules under the Telecommunications Act of 1996). And most recently, this Court decided the case of *Household*, 541 U.S. ___, 124 S. Ct. 1741.

The Illinois Supreme Court's decision raises a similar important question that has been decided contrary to the opinion of the Supreme Court of Mississippi. Furthermore, allowing this decision to stand will be doing a grave injustice to the consumers and will also have an overwhelmingly undermining effect on the Magnuson-Moss Warranty Act. This Court should grant certiorari now without waiting for other courts to follow suit.

The Illinois Supreme Court's decision has permitted manufacturers to cut off consumers' right to judicial remedy and review hereby defeating the legislature's true intent in drafting the Magnuson-Moss Act. The Magnuson-Moss Act was intended to improve competition, but under the courts decision the consumers have no ability to shop for products without these overreaching, binding arbitration provisions. Such a decision goes against Congress' express desire to protect the average consumers from harmful overreaching in consumer product warranties.

Additionally and as articulated above, this Court has repeatedly held that legislative regulations adopted by the federal administrative agencies must be given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute pursuant to which they are adopted. *See Household* at *5, (*Chevron, 467 U.S.* at 843-844).

Justice Rarick in his dissent in *Borowiec* recognized this principle. He agreed that state courts may declare a federal statute or regulation unconstitutional or hold a federal regulation invalid because it has not been properly enacted. However, Justice Rarick correctly opined that "properly promulgated agency regulations implementing federal statutes have the force and effect of federal law, which state courts are bound to follow. For a state court to override such regulations would violate the Supremacy Clause of the United States Constitution." *Borowiec*, at *80-81 citing *Boron Oil Co. v. Downie, 873 F. 2d 67,71 (4th Cir. 1989).*

Only review by this Court can eliminate such compliance problems with the Supremacy Clause and put consumers back on a level playing field to address in a court of law grievances with their defective products.

The question presented is ripe for review. On remand, the issues will be whether Gateway breached the written and implied warranties. The petition presents an important issue of law and needs to be decided immediately. These are compelling reasons to grant certiorari now and summarily reverse.

Conclusions

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Illinois Supreme Court's decision not only conflicts with another state court of last resort as to the same question of federal law, the decision also conflicts with the Federal Trade Commission's regulation involving this same federal question.

Respectfully submitted,

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June 29, 2004

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Docket No. 94235-Agenda 10-March 2003.

MICHAEL BOROWIEC *et al.*, Appellees, v. GATEWAY 2000, INC., Appellant.

Opinion filed April 1, 2004.

JUSTICE FREEMAN delivered the opinion of the court:

In this appeal, we consider whether the circuit court of Cook County erred in denying the motion to dismiss or to compel arbitration filed by Gateway 2000, Inc. (Gateway), in each of three cases seeking, *inter alia*, damages for breach of express and implied warranties under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 U.S.C. §2301 *et seq.* (1994)), and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1998)). The appellate court consolidated the cases and affirmed the circuit court's denial of each motion to dismiss or to compel arbitration. 331 Ill. App. 3d 842. We granted Gateway's petition for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill. 2d R. 315), and now reverse and remand for further proceedings.

BACKGROUND

E. Michael Borowiec

In November 1999, plaintiff Michael Borowiec purchased a Gateway Performance 600 PC computer and a three-year parts and on-site labor services contract from Gateway. In connection with the purchase, Gateway extended a limited money-back guarantee to Borowiec, upon notification to Gateway within 30 days of shipment of the computer and prompt return of the computer. Gateway also warranted that the computer was free from defects in materials and workmanship. Both the "Labor Services Service Contract" and the "Limited Warranty Agreement" contained a dispute resolution clause whereby the parties agreed that any dispute between them would be

"resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules."

In June 2000, Borowiec filed a complaint against Gateway in the circuit court of Cook County. In the complaint, Borowiec alleged that the computer had numerous defects and nonconformities. Borowiec also alleged that Gateway refused to perform on-site repair of the computer. As a consequence, Borowiec delivered the computer to Gateway on numerous occasions for repair. Gateway was unable to repair the computer to Borowiec's satisfaction. On May 13, 2000, Borowiec revoked his acceptance of the computer. The complaint sought damages for breach of written and implied warranties pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss Act or MMWA) (15 U.S.C. §2301 *et seq.* (1994)), violation of the Illinois Consumer Fraud and Deceptive Business Practices Act[1] (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 1998)), and common law fraud.

On September 1, 2000, Gateway filed a motion to dismiss the complaint, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2000)), for lack of subject matter jurisdiction and to compel arbitration. The circuit court denied the motion to dismiss and Gateway appealed.

B. Dorota and Tadeusz Kobik

In January 2001, plaintiffs Dorota and Tadeusz Kobik purchased a Gateway Performance 1000 PC computer, and a one-year on-site service, three-year labor and parts contract from Gateway. In connection with the purchase, Gateway extended a limited money-back guarantee to the Kobiks, upon notification to Gateway within 30 days of shipment of the computer and prompt return of the computer. Gateway also warranted that the computer was free from defects in materials and workmanship. The "Limited Warranty Agreement" contained a dispute resolution clause whereby the parties agreed that any dispute between them would be resolved exclusively and finally by arbitration administered by the NAF.

In October 2001, the Kobiks filed a complaint against Gateway in the circuit court of Cook County. In the complaint, the Kobiks alleged that the computer had numerous defects and nonconformities, including a defective hard drive. The Kobiks also alleged that Gateway refused to perform on-site repair of the computer. As a consequence, the Kobiks delivered the computer to Gateway on numerous occasions for repair. Gateway was unable to repair the computer and the Kobiks lost confidence in the computer's reliability. On August 30, 2001, the Kobiks revoked their acceptance of the computer. The complaint sought damages for breach of written and implied warranties pursuant to the Magnuson-Moss Act and violation of the Consumer Fraud Act.

Pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)), on October 22, 2001, Gateway filed a motion to dismiss the complaint or, in the alternative, to compel arbitration and stay the proceedings pending completion of arbitration. The circuit court denied the motion and Gateway appealed.

C. Leslie Waldron

In November 2000, plaintiff Leslie Waldron purchased a Gateway Essential 866 computer and a labor services contract from Gateway. In connection with the purchase, Gateway extended a limited money-back guarantee to Waldron, upon notification to Gateway within 30 days of shipment of the computer and prompt return of the computer. Gateway also warranted that the computer was free from defects in materials and workmanship. The "Limited Warranty Agreement" contained a dispute resolution clause whereby the parties agreed that any dispute between them would be resolved exclusively and finally by arbitration administered by the NAF.

In November 2001, Waldron filed a complaint against Gateway in the circuit court of Cook County. In the complaint, Waldron alleged that shortly after the purchase the computer exhibited numerous defects and nonconformities, including a defective CD-ROM, motherboard, power supply, and processor. Waldron also alleged that Gateway refused to perform on-site repair of the computer and required that Waldron bring the computer to Gateway's facility for

repairs. Waldron delivered the computer to Gateway on numerous occasions for repair. Gateway was unable to repair the computer, and Waldron lost confidence in the computer's reliability. On October 1, 2001, Waldron revoked her acceptance of the computer. The complaint sought damages for breach of written and implied warranties pursuant to the Magnuson-Moss Act, revocation of acceptance pursuant to the Magnuson-Moss Act, and violation of the Consumer Fraud Act.

Pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)), on November 21, 2001, Gateway filed a motion to dismiss the complaint or, in the alternative, to compel arbitration and stay the proceedings pending completion of arbitration. The circuit court denied the motion, and Gateway appealed.

D. Common Facts

In the consolidated appeals, the appellate court held that the Magnuson-Moss Act precluded binding arbitration of the consumer disputes. 331 Ill. App. 3d at 848. The court reasoned that Congress intended to preserve a judicial forum for consumers. 331 Ill. App. 3d at 848. Gateway's limited warranty agreement, with its binding arbitration clause, violated the Magnuson-Moss Act and was therefore unenforceable. 331 Ill. App. 3d at 851. Accordingly, the court affirmed the decisions of the circuit court denying Gateway's motion to dismiss and compel arbitration.

We granted Gateway's petition for leave to appeal. We allowed the Chamber of Commerce of the United States of America and the Consumer Electronics Association to file an *amicus curiae* brief in support of Gateway. We also allowed the National Association of Securities and Commercial Law Attorneys to file an *amicus curiae* brief in support of the plaintiffs.

ANALYSIS

E. Standard of Review

As noted above, Gateway filed a motion to dismiss Borowiec's complaint for lack of subject matter jurisdiction and to compel arbitration pursuant to section 2-615 of the Code of Civil Procedure. *See* 735 ILCS 5/2-615 (West 2000). In the actions initiated by Waldron and the Kobiks, Gateway filed motions to dismiss and to compel arbitration pursuant to section 2-619 of the Code of Civil Procedure. *See* 735 ILCS 5/2-619 (West 2000). A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics*, 159 Ill. 2d at 484; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). Thus, the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997); *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87 (1996). When ruling on a 2-615 motion, a trial court is to dismiss the cause of action only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery. *Bryson*, 174 Ill. 2d at 86-87; *Illinois Graphics*, 159 Ill. 2d at 488. A court of review determines *de novo* whether the trial court should have granted dismissal. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003).

In contrast, a section 2-619 motion provides for the involuntary dismissal of a cause of action based on certain defects or defenses. Amongst the enumerated grounds for a 2-619 dismissal are that the court does not have jurisdiction of the subject matter of the action (735 ILCS 5/2-619(a)(1) (West 2000)) and that the claim asserted is barred by other affirmative matter which avoids the legal effect of or defeats the claim (735 ILCS 5/2-619(a)(9) (West 2000)). Affirmative matter must be supported by affidavit, unless apparent on the face of the pleading attacked (735 ILCS 5/2-619(a) (West 2000)), and, in ruling on the motion, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). The standard of review on appeal is *de novo*. *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472, 480 (1999); *Chicago Flood Litigation*, 176 Ill. 2d at 189.

Initially we note that Gateway's motion to dismiss Borowiec's complaint was for lack of subject matter jurisdiction and was supported by affidavit. The motion was more appropriately designated a motion pursuant to section 2-619 than a motion pursuant to section 2-615. Borowiec, however, was not prejudiced by the improper designation, and responded appropriately to the motion. Accordingly, we will consider the motion as though it had been filed under section 2-619. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002); *City of Burbank v. Czaja*, 331 Ill. App. 3d 369, 374 (2002).

B. Federal Arbitration Act

Turning to the merits of the appeal, we consider first the history and purpose of the Federal Arbitration Act (Arbitration Act or FAA) (9 U.S.C. §1 *et seq.* (1994)). Congress enacted the Arbitration Act in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 114 L. Ed. 2d 26, 36, 111 S. Ct. 1647, 1651 (1991). The Arbitration Act provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1994).

The Arbitration Act also provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C. §4 (1994). The Arbitration Act reflects a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 785, 103 S. Ct. 927, 941 (1983).

In *Gilmer*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647, the Court commented on the interplay between the Arbitration Act and statutory remedies created by Congress. The Court observed:

"It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§1-7; §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.*; and §12(2) of the Securities Act of 1933, 15 U.S.C. §77*l*(2). [Citations.] In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' [Citation.]

Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' [Citation.] In this regard, we note that the burden is on [the plaintiff] to show that Congress intended to preclude a waiver of a judicial forum for [the statutory] claims. [Citation.] If such an intention exists, it will be discoverable in the text of the [act], its legislative history, or an 'inherent conflict' between arbitration and the [act's] underlying purposes. [Citation.] Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Gilmer*, 500 U.S. at 26, 114 L. Ed. 2d at 37, 111 S. Ct. at 1652.

Lastly, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-85, 134 L. Ed. 2d 902, 907, 116 S. Ct. 1652, 1655 (1996), the Supreme Court commented on the preemptive effect of the Arbitration Act:

"In *Southland*, we held that §2 of the FAA applies in state as well as federal courts [citation] and 'withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,' [citation]. We

noted in the pathmarking *Southland* decision that the FAA established a 'broad principle of enforceability,' [citation], and that §2 of the federal Act provided for revocation of arbitration agreements only upon 'grounds as exist at law or in equity for the revocation of any contract.' In *Perry*, we reiterated: '[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of §2].'[Citation.]" (Emphasis in original.)

In the present case, both the labor services service contract and the limited warranty agreement contained a dispute resolution clause whereby the parties agreed that any dispute between them would be resolved by binding arbitration. Thus, the claims advanced by the plaintiffs are subject to arbitration unless the plaintiffs show that Congress intended to preclude a waiver of a judicial forum for their federal statutory claims. Further, plaintiffs' state law claims may not be premised solely on the fact that a contract to arbitrate is at issue. We turn then to provisions of the Magnuson-Moss Act.

C. The Magnuson-Moss Act

The Magnuson-Moss Act was enacted in 1975 to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. §2302(a) (1994). To that end, the Magnuson-Moss Act establishes standards governing the content of consumer product warranties and service contracts. 15 U.S.C. §§2301 through 2308 (1994). The Magnuson-Moss Act also provides a statutory private right of action to consumers who are "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." 15 U.S.C. §2310(d)(l) (1994). The consumer may bring an action in either federal or state court and may recover costs and expenses that were reasonably incurred in connection with the commencement and prosecution of the action. As part of costs and expenses, the consumer may recover attorney

fees, unless the court determines that such an award is inappropriate. 15 U.S.C. §2310(d)(2) (1994).

The Magnuson-Moss Act does not expressly prohibit arbitration, and, in fact, does not refer either to binding arbitration or to the Arbitration Act. The Magnuson-Moss Act does provide, however, that, prior to filing an action for failure to comply with any *obligation under a written or implied* warranty or service contract, a consumer give the person obligated under the warranty or service contract a reasonable opportunity to cure such failure to comply. 15 U.S.C. §2310(e) (1994). Also, the Magnuson-Moss Act provides for the establishment of informal dispute settlement mechanisms, and authorizes the Federal Trade Commission (FTC) to prescribe rules setting forth the minimum requirements for the procedures. 15 U.S.C. §2310(a) (1994). If a warrantor establishes an informal dispute settlement procedure which complies with the requirements of the FTC rules, and the warrantor incorporates in a written warranty a requirement that the consumer resort to such procedure, the consumer may not commence a civil action unless he initially resorts to the procedure. 15 U.S.C. §2310(a)(3) (1994). Furthermore, in any civil action instituted by a consumer "arising out of a warranty obligation and relating to a matter considered in [the informal dispute resolution] procedure, any decision in such procedure shall be admissible in evidence." 15 U.S.C. §2310(a)(3) (1994). The Magnuson-Moss Act nowhere defines the terms "informal dispute settlement procedures" and "informal dispute settlement mechanisms."

In enforcing the Magnuson-Moss Act, the FTC has determined that decisions of an informal dispute settlement mechanism "shall not be legally binding on any person" (16 C.F.R. §703.5(j) (2003)) and has defined the term "mechanism" broadly to include binding arbitration. 40 Fed. Reg. 60167, 60210, 60211, 60218 (1975). The FTC has also ruled that "[a] warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract." 16 C.F.R. §700.8 (2003). In 1999, the FTC affirmed that the regulations "will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that

would require consumers to submit warranty disputes to binding arbitration." 64 Fed. Reg. 19700, 19708-09 (1999).

D. Binding Arbitration

The appellate court recognized that federal policy strongly favors the judicial enforcement of arbitration agreements. 331 Ill. App. 3d at 847. However, from its examination of the text of the Magnuson-Moss Act, the appellate court determined it was Congress' intent to ultimately preserve a judicial forum for consumers. 331 Ill. App. 3d at 848. In arriving at this conclusion, the appellate court noted the Magnuson-Moss Act provides that a decision in an informal dispute resolution procedure shall be admissible in evidence in any civil action arising out of a warranty obligation and relating to a matter considered in the informal dispute resolution procedure. 331 Ill. App. 3d at 849. The appellate court opined that an informal dispute settlement procedure is a prerequisite, not a bar, to relief in court. 331 Ill. App. 3d at 849. The appellate court also referenced legislative history to the effect that an informal dispute settlement procedure is not a bar to legal action. 331 Ill. App. 3d at 849-50. Lastly, the appellate court relied on the FTC's ruling that informal dispute resolution mechanisms, including arbitration, may not be binding upon the consumer.

In this court, plaintiffs urge affirmance of the appellate court decision. Plaintiffs ask that we defer to the FTC's interpretation of the Magnuson-Moss Act and argue that the agency's interpretation is supported by the legislative history of the Act. Plaintiffs also maintain that, while the Arbitration Act policy favoring arbitration and the Magnuson-Moss Act consumer protection objectives are generally not in conflict, a conflict arises when a binding arbitration clause is inserted in an agreement purporting to extend a warranty to the consumer. Plaintiffs believe this conflict must be resolved by giving precedence to the Magnuson-Moss Act over the Arbitration Act. We disagree with the reasoning of the appellate court and the arguments advanced by plaintiffs.

In arriving at our decision, we note that the federal circuits which have considered the issue have rejected the FTC's interpretation. We

find the Fifth Circuit's analysis in *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002), particularly helpful. In *Walton*, the court of appeals reversed the district court's order denying the manufacturer's motion to compel arbitration of the consumer's Magnuson-Moss claim. The court first examined the roles of the judiciary and the FTC in interpreting the Magnuson-Moss Act:

"When we review an agency's construction of a statute that it administers, we must defer to that agency's interpretation of the statute if: (1) Congress has not spoken directly to the issue; and (2) the agency's interpretation 'is based on a permissible construction of the statute.' [Citation.] 'The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent ... . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' " *Walton*, 298 F.3d at 475.

Next, the court examined the text of the Magnuson-Moss Act:

"The text of the MMWA does not specifically address binding arbitration, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration. Although the MMWA allows warrantors to require that consumers use 'informal dispute settlement procedures' before filing a suit in court, and allows the FTC to establish rules governing these procedures, it does not define 'informal dispute settlement procedure.' However, the MMWA does make clear that these are to be used before filing a claim in court. Yet binding arbitration generally is understood to be a substitute for filing a lawsuit, not a prerequisite. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) ('By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.')

* * *

We also note that binding arbitration is not normally considered to be an 'informal dispute settlement procedure,' and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations. We thus conclude that the text of the MMWA does not evince a congressional intent to prevent the use of binding arbitration." (Emphasis omitted.) *Walton*, 298 F.3d at 475-76.

The court then considered the legislative history of the Magnuson-Moss Act:

"The legislative history does not specifically discuss the availability of arbitration, nor does it define or shed light on the meaning of 'informal dispute settlement procedure.' The legislative history does indicate that such procedures were meant to be non-binding. For example, the House Report on the MMWA states that '[a]n adverse decision in any informal dispute settlement procedure would not be a bar to a civil action on the warranty involved in the proceeding ... .' H.R. Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723. The Conference Committee report also indicates that if a consumer chooses not to pursue an informal dispute settlement procedure, a consumer can still pursue 'all alternative avenues of redress.' S. Conf. Rep. No. 93-1408 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755, 7758. However, there is still no evidence that Congress intended binding arbitration to be considered an informal dispute settlement procedure. Therefore the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration, which is of a different nature. The legislative history's reference to 'civil action' neither explicitly includes nor precludes binding arbitration. However, the reference to 'informal dispute settlement procedure' seemingly precludes binding arbitration from its scope, as binding arbitration is not normally considered an informal procedure. Binding arbitration simply is not part of these reports. These passages therefore do not support an assertion that Congress intended to preclude binding arbitration. Additionally, the Conference Committee Report states that the legislation requires 'provision [by the warrantor] for governmental or consumer participation in internal or other private dispute settlement procedures ... .' *Id.* Again, this does not indicate an intent to preclude binding arbitration. It simply requires that the consumer (or perhaps

the government) participate in the informal procedures established by the warrantor. The Committee cannot have had in mind binding arbitration in its comments, as the government does not normally participate in private binding arbitration procedures. Again, these congressional reports do not demonstrate that Congress intended for binding arbitration to be included within the scope of these informal dispute settlement procedures, nor that it intended to preclude binding arbitration under the MMWA." *Walton*, 298 F.3d at 476-77.

Lastly, the court examined the purposes of the Magnuson-Moss Act and considered whether they conflicted with the Arbitration Act:

"We do not see any inherent conflict between arbitration and these purposes. Consumers can still vindicate their rights under warranties in an arbitral forum. Warranties can provide adequate and truthful information to consumers, while also requiring binding arbitration. Arbitration is not inherently unfair to consumers. *See Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) ('Congress, when enacting the [FAA], had the needs of consumers ... in mind.') Although the legislative history of the MMWA expresses a concern with the unequal bargaining power of consumers, *see* S. Rep. No. 93-151, at 22-23 (1973), a perception of unequal bargaining power is not enough to unilaterally hold arbitration agreements unenforceable. *See Gilmer*, 500 U.S. at 33, 111 S. Ct. 1647. Of course, courts can consider individual claims of fraud or unconscionability in arbitration agreements as they would in any other contract. *See id.* We thus can find no inherent conflict between the MMWA and the FAA." *Walton*, 298 F.3d at 478.

The court concluded that the text, legislative history, and purposes of the Magnuson-Moss Act do not evince a congressional intent to bar arbitration of written warranty claims. There being no doubt that Congress has expressed a clear intention in favor of arbitration, the court held the plaintiffs signed a valid binding arbitration agreement and must arbitrate their Magnuson-Moss claims. *Walton*, 298 F.3d at 478.

Similarly, in *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), the court of appeals rejected the FTC's interpretation of the Magnuson-Moss Act. In doing so, the court

employed an analysis similar to that used by the *Walton* court. The court reviewed the text and legislative history of the Magnuson-Moss Act as well as the purposes of the Magnuson-Moss Act and the Arbitration Act. The court found that the text of the Magnuson-Moss Act does not expressly prohibit arbitration. *Davis*, 305 F.3d at 1274-75. Further, Congress did not express a clear intent in the legislative history of the Magnuson-Moss Act to bar binding arbitration agreements in written warranties. *Davis*, 305 F.3d at 1274-77. The court also found that the declared purposes of the Magnuson-Moss Act do not evince such a conflict with the Arbitration Act as to prohibit binding arbitration of Magnuson-Moss claims. *Davis*, 305 F.2d at 1277.

Unlike the *Walton* court, however, the court in *Davis* also examined the reasonableness of the FTC's construction of the statute. Initially, the *Davis* court differentiated between the FTC's legislative regulations and the FTC's interpretive regulations. The court noted that the *Chevron* (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2776 (1984)) standard of deference applies to the FTC's legislative regulations and not to the interpretive regulations. The court observed that "while we must defer to the legislative regulations in 16 C.F.R. §§701.1-703.8 (2002) if they are reasonable, the FTC's interpretive regulations are only 'entitled to respect' to the extent they 'have the power to persuade.' " *Davis*, 305 F.3d at 1278 n.7.

Turning to the legislative regulations, the court noted that the FTC based its construction on Congress' grant of concurrent jurisdiction. The court observed, however, that a statute's provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the Arbitration Act. Consequently, the court concluded that the FTC's motive behind the legislative regulation is unreasonable. *Davis*, 305 F.3d at 1280. The court then referred to the FTC's interpretive regulations:

"The FTC further explained that binding arbitration agreements are not allowed in written warranties for several reasons:

First, as the Staff Report indicates, Congressional intent was that decisions of Section 110 Mechanisms not be legally binding.

Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers. 40 Fed. Reg. 60167, 60210 (1975)." *Davis*, 305 F.3d at 1278-79.

The court noted this rationale was also unreasonable:

"Although the FTC first stated that it looked to a subcommittee staff report (which appears to no longer be attainable) to determine Congress's intent, the FTC continued, evincing its major concern that an arbitral forum will not adequately protect the individual consumers. The Supreme Court in *McMahon*, however, rejected this same hostility shown by the SEC. 482 U.S. at 234 n.3, 107 S. Ct. at 2341 n.3 (declining to defer to the SEC's interpretation of the Securities Exchange Act of 1934 based on the SEC's *Wilko* attitude). Instead, the Supreme Court holds that arbitration is favorable to the individual. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 279, 115 S. Ct. at 842-43 (noting that 'arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.')" *Davis*, 305 F.3d at 1279.

The court concluded, "[a]fter a thorough review of the MMWA and the FAA, combined with the strong federal policy favoring arbitration," that written warranty claims arising under the Magnuson-Moss Warranty Act may be subject to valid binding arbitration agreements. *Davis*, 305 F.3d at 1280. *See also Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001); *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. App. 2003); *Abela v. General Motors Corp.*, 257 Mich. App. 513, 669 N.W.2d 271 (2003); *but see Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002).

We also take note of the holding of *Harrison v. Nissan Motor Corp.*, 111 F.3d 343 (3d Cir. 1997). In *Harrison*, the defendant moved to dismiss the complaint because the plaintiff had failed to resort to an

informal dispute resolution procedure provided by the defendant pursuant to the Pennsylvania Automobile Lemon Law. By the terms of the Lemon Law, the alternative dispute resolution procedure provided by the manufacturer had to comply with the FTC regulations promulgated under the Magnuson-Moss Act. The FTC regulations at issue required alternative dispute resolution mechanisms to render a decision within 40 days of notification of the dispute. 16 C.F.R. §703.5(d) (2003). The regulations also provided that a "requirement that a consumer resort to the Mechanism prior to commencement of an action *** shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under *** this section, whichever occurs sooner." 16 C.F.R. §703.5(i) (2003). The district court denied the motion to dismiss and the defendant appealed, arguing that the district court order denying the motion to dismiss was equivalent to an order denying a motion to compel arbitration under the Arbitration Act.

On appeal, the Third Circuit noted that for the Arbitration Act to apply, the party seeking to compel arbitration was required to show the existence of a written agreement that contained an arbitration clause and affected interstate commerce. *Harrison*, 111 F.3d at 348. The court found there was an "agreement *qua* agreement" between the parties to submit the dispute to the alternative dispute resolution mechanism. *Harrison*, 111 F.3d at 348 n.8. Although the warranty stated that the use of the mechanism was voluntary, and it alone did not constitute a sufficient written agreement, the warranty constituted an offer for dispute resolution that was accepted by the written request for dispute resolution sent by plaintiff's counsel to the mechanism. *Harrison*, 111 F.3d at 348 n.8. However, the alternative dispute resolution procedure at issue was not "arbitration" within the meaning of the Arbitration Act. The court explained:

"Although it defies easy definition, the essence of arbitration, we think, is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator. Arbitration does not occur until the process is completed and the arbitrator makes a decision. Hence, if one party seeks an order compelling arbitration and it is granted, the parties must then arbitrate their dispute to an

arbitrators' decision and cannot seek recourse to the courts before that time. [Citation.]

But the informal alternative dispute resolution process contemplated by the Lemon Law does not fit this characterization. Rather, while many cases in which claimants invoke the informal process will proceed to an arbitrator's award, some will not. That is because, under the FTC regulations with which a mechanism must comply, a dissatisfied car owner can file suit under the Lemon Law if he or she has not received a decision from the arbitrator after forty days. In other words, whatever the meaning of the 'first resort' requirement, a claimant cannot be barred from pursuing litigation under the Lemon Law if the mechanism delays for more than forty days. The claimant would not, therefore, pursue the procedure to completion in all cases. Under all these circumstances, the informal dispute resolution mechanism provided for by Nissan pursuant to the Lemon Law does not constitute arbitration within the meaning of the FAA.

E. * *

We find further support for the conclusion that the FAA does not apply to Lemon Law ADR procedures in the fact that the Lemon Law, the Magnuson-Moss Warranty Act, and the FTC regulations all refer to the procedure at issue as an 'informal dispute resolution procedure.' If the drafters had intended this procedure to be cognizable under the FAA, then it is likely that they would have referred to it as 'arbitration.' Indeed, the term 'arbitration' has come into this case solely because the [Mechanism] has labeled the second part of its procedures 'arbitration.' That alone is not sufficient to trigger the FAA. We, therefore, hold that Harrison and Nissan did not enter into a contract to arbitrate their dispute within the meaning of the FAA and that we lack jurisdiction over Nissan's appeal." *Harrison*, 111 F.3d at 350-51.

As noted above, the FTC believes that informal dispute resolution procedures include arbitration. Further, according to the FTC, an agreement which contains a binding arbitration clause violates the provisions of the Magnuson-Moss Act because the Act provides that informal dispute resolution procedures cannot be binding on the consumer. By holding that an informal dispute resolution procedure

does not qualify as "arbitration" under the Arbitration Act, *Harrison* calls into question the FTC's interpretation of the Magnuson-Moss Act.

In *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335 (1996), quoting *Bowman v. Illinois Central R.R. Co.*, 11 Ill. 2d 186, 200 (1957), this court observed that "decisions of the Federal courts interpreting a Federal act *** are controlling upon Illinois courts, 'in order that the act be given uniform application.' " *See also Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 266 (2001); *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 383 (1999); *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 38 Ill. 2d 31, 34-35 (1967). This court has also noted that support for an agency's administrative pronouncements must be abandoned where the pronouncements are found by a reviewing court to be at odds with the law. *Castillo v. Jackson*, 149 Ill. 2d 165, 189 (1992). As discussed above, in *Walton* and *Davis*, the Fifth Circuit and the Eleventh Circuit ruled that the FTC's interpretation of the Magnuson-Moss Act is incorrect and a clause requiring binding arbitration of a consumer's claim does not violate the statute. And in *Harrison*, the Third Circuit cast doubt upon the FTC's ruling that informal dispute resolution procedures include arbitration. Accordingly, the federal circuit courts of appeals are in agreement in their interpretation of this federal statute. Because federal circuit court authority on the issue is uniform, we, too, hold that the Magnuson-Moss Act does not bar arbitration of a consumer's claims under the Act. *See Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 422-23 (1999).

E. Other Issues

In this court, plaintiffs raise additional issues regarding the validity of the arbitration clauses. Plaintiffs argue that the arbitration clauses are inconspicuous and are not "disclose[d] in simple and readily understood language," thus violating section 2302(a) of the Magnuson-Moss Act and the FTC regulations. Plaintiffs also argue that the arbitration clauses contain a fee-shifting provision and are therefore illegal under the Arbitration Act. Lastly, plaintiffs argue that the arbitration clauses are unenforceable, under ordinary state

law principles, because of the fee-shifting provision and because there are exorbitant charges for the use of the arbitration procedure. We note that the complaints do not contain allegations in support of these claims and plaintiffs did not raise these arguments in the memoranda they filed in opposition to Gateway's motions to dismiss. We also note that the appellate court did not address the additional issues plaintiffs now raise. Lastly, we note that in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the court required two customers who purchased a Gateway 2000 computer to submit their claims against Gateway to arbitration. In doing so, the court rejected several challenges to the validity of the Gateway arbitration clause. In light of these circumstances, we elect not to address plaintiffs' additional arguments.

CONCLUSION

For the reasons stated above, in the absence of such grounds as exist at law or in equity for the revocation of any contract, the circuit court should have granted Gateway's motions to dismiss the complaints and compel arbitration. The judgments of the appellate and circuit courts are therefore reversed and the causes are remanded to the circuit court for proceedings consistent with this opinion.

Appellate court judgments reversed;

circuit court judgments reversed;

causes remanded.

JUSTICE KILBRIDE, dissenting:

I join in Justice Rarick's dissent, but I write separately to raise several additional points, including my belief that the majority

opinion runs afoul of the most fundamental of all statutory rules, namely, to construe statutes so as to effectuate the true intent of the drafters. *See Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990) (stating that "[i]n interpreting a statute, the primary rule *** is to ascertain and give effect to the true intent and meaning of the legislature").

The Magnuson-Moss Act was specifically designed to protect consumers. *See* 15 U.S.C. §2302(a) (1994) (stating the Magnuson-Moss Act was enacted "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products"). The result reached by the majority, however, directly undermines this purpose by permitting manufacturers to slip mandatory, binding arbitration provisions into nonnegotiable consumer product warranties and, thus, to limit consumers' avenues of relief in the event of a warranty dispute. Because I believe this result contradicts the legislature's intent to protect consumers' interests in product warranty disputes, I respectfully dissent.

In rejecting the FTC's regulations interpreting the Magnuson-Moss Act, the majority relies heavily on both *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002) (slip op. at 10-13) and *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002) (slip op. at 13-15). I cannot agree with the majority's approach to these cases.

In *Walton*, the federal appeals court applied the test adopted by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 702-03, 104 S. Ct. 2778, 2781-82 (1984), to determine whether courts must defer to agencies' statutory interpretations. Under this test, a court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 81 L. Ed. 2d at 702-03, 104 S. Ct. at 2781. If the legislature's intent is clear and unambiguous, we must follow it. *Chevron*, 467 U.S. at 842-43, 81 L. Ed. 2d at 703, 104 S. Ct. at 2781. If Congress has not clearly addressed the issue before us, however, we must consider whether the agency's interpretation of the section is reasonable. *Chevron*, 467 U.S. at 843, 81 L. Ed. 2d at 703, 104 S. Ct. at 2781-82. " 'If [the agency's] choice represents a reasonable accommodation of

conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' " *Chevron*, 467 U.S. at 845, 81 L. Ed. 2d at 704, 104 S. Ct. at 2783, quoting *United States v. Shimer*, 367 U.S. 374, 383, 6 L. Ed. 2d 908, 915, 81 S. Ct. 1554, 1560 (1961).

In the instant case, I believe the majority has unwisely chosen to follow the *Walton* court's erroneous conclusion on prong one of the *Chevron* test. Slip op. at 10 (finding the *Walton* analysis "particularly helpful"). The *Walton* court held that Congress had spoken directly to the precise issue of whether binding arbitration provisions are permissible in consumer product warranties. *Walton*, 298 F.3d at 478 (stating that "[t]he clear congressional intent in favor of enforcing valid arbitration agreements controls in this case"). That mistaken conclusion, in turn, obviated the need to reach the second prong of the *Chevron* analysis and, thus, to address the reasonableness of the FTC's interpretation. *Walton*, 298 F.3d at 478 n.14.

The *Walton* court's error is apparent from both the text and the legislative history of the Magnuson-Moss Act. Notably, the text of the Act is completely silent concerning its interaction with the Arbitration Act in consumer warranty cases. *Walton*, 298 F.3d at 475 (acknowledging that the text did not address the permissibility of binding arbitration clauses in consumer warranties). Under the *Chevron* analysis, if the statute is silent on a given issue, we must next consider whether the agency's construction of the statute is permissible. *Chevron*, 467 U.S. at 843, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782. Thus, since the statute itself is silent on the precise question at issue here, the *Walton* court should have proceeded to prong two of the analysis. At best, the statute's silence necessarily creates a strong ambiguity regarding Congress' true intent on this issue. By overlooking the absence of any language in the Magnuson-Moss Act directly addressing its potential conflict with the Arbitration Act and rushing headlong to the conclusion that Congress has directly spoken on this precise question, the majority in both *Walton* and this case ignore the express directive of the Supreme Court established in the *Chevron* test. Since the Magnuson-

Moss Act is undisputedly silent on this issue, this court should proceed with an analysis of prong two of the *Chevron* test and consider whether the FTC's regulations are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782.

In addition, yet another material ambiguity exists in the Magnuson-Moss Act, precluding adoption of the *Walton* court's conclusion that Congress had already directly spoken to this issue. The scope of the term "informal dispute settlement procedures" in section 2310 is directly at issue here, yet it is not at all clear whether Congress intended that term to include mandatory binding arbitration. This additional ambiguity in the text of the Magnuson-Moss Act again requires reviewing courts to examine the second prong of the *Chevron* test and determine the reasonableness of the FTC's interpretation. *See Chevron*, 467 U.S. at 843, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782 (explaining that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). I believe that here the statutory language is inherently ambiguous and, thus, a reviewing court must proceed to prong two of the *Chevron* analysis. Due to the *Walton* court's failure to recognize any of these ambiguities, however, it erroneously concluded its analysis under prong one of the *Chevron* test.

Moreover, the Supreme Court has explained that, in examining the first prong of the *Chevron* test, courts should view the relevant statutory language in context and with an eye toward advancing the overall statutory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 146 L. Ed. 2d 121, 133-34, 120 S. Ct. 1291, 1300-01 (2000). While the *Walton* court purported to review the relevant legislative history, it appears to have applied the wrong standard in conducting the *Chevron* test. *Walton*, 298 F.3d at 276-77. The court required a showing that the legislature clearly intended to preclude the arbitration of claims under the Magnuson-Moss Act before it would proceed to prong two of the *Chevron* test. *Walton*, 298 F.3d at 477. As stated in *Chevron*, the actual test under prong one is not whether the legislature expressed a clear intent to adopt the premise underlying the regulation subsequently issued by the

agency but, rather, whether the "statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843, 81 L. Ed. 2d at 703, 104 S. Ct. at 2782. I believe that, at most, when reviewed under the proper standard, the legislative histories of the relevant acts demonstrate the ambiguous nature of the relationship between section 2310 and the Arbitration Act. Thus, the majority's reliance on *Walton* is misplaced.

In *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002), cited with favor by the majority here (slip op. at 13-15), the federal appeals court also concluded that the legislative history of the Magnuson-Moss Act "is ambiguous at most." As the *Davis* court noted, a preliminary Senate report on the Magnuson-Moss Act stated that " 'it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation or *formal arbitration*.' " (Emphasis added.) *Davis*, 305 F.3d at 1276, quoting S. Rep. No. 91-876, at 22-23 (1970). Viewed in this context, the congressional intent underlying section 2310 is not at all clear from the statutory language and legislative history, contrary to the *Walton* court's conclusion. Accordingly, the *Davis* court concluded that "the intent of Congress is unclear," requiring it to proceed to prong two of the *Chevron* test. *Davis*, 305 F.3d at 1278.

Although the majority also supports its decision by looking to *Harrison v. Nissan Motor Corp.*, 111 F.3d 343 (3d Cir. 1997), I fail to see how *Harrison* adds any substantial support to the result reached in this case. *Harrison* held that a voluntary, nonbinding arbitration provision in a car warranty does not qualify as "a contract to arbitrate their dispute within the meaning of the FAA," thus leaving the court without jurisdiction over the appeal. *Harrison*, 111 F.3d at 351. This is not the same case. Here, a *mandatory, binding* arbitration provision, that is nonnegotiable and was unilaterally created by Gateway, effectively cuts off all consumers' rights to any opportunity for judicial recourse.

Despite the widely conflicting analyses in *Walton* and *Davis*, and the tangential and inapposite reference to *Harrison*, the majority in this case attempts to support its result by citing the uniformity of the

federal appellate courts that have reviewed the issue. Slip op. at 18. Even a cursory examination of the *Walton* and *Davis* decisions, however, reveals that they could not be further apart in their rationales. Thus, the purported uniformity of the federal circuit courts of appeals relied on here by the majority is illusory. Regrettably, the majority opinion does not adopt a single rationale based on either of these cases, appearing instead to apply both. Slip op. at 18. Without any explanation of the specific rationale used to decide this case, the majority's opinion fails to provide any guidance for future cases. I cannot countenance such an open-ended approach to setting precedent in this state.

I also believe the majority has ignored a basic rule of statutory construction by approving the rationale in *Walton*. The *Walton* court failed to apply the long-standing general rule that more recent and specific legislation prevails over broader, earlier legislation. *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002). *See also* slip op. at 33-34, 40 (Rarick, J., dissenting, joined by Kilbride, J.). Recently, the United States Supreme Court also applied this fundamental rule of construction.

"The 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.' [Citation.] This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently ***, 'a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.' [Citation.]" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143, 146 L. Ed. 2d 121, 140, 120 S. Ct. 1291, 1306 (2000).

Here, the Magnuson-Moss Act was passed 50 years after the Arbitration Act and expressly addressed consumer warranty issues. In contrast, the Arbitration Act concerned the use of arbitration in general contract disputes. Under the applicable rule of construction, the Magnuson-Moss Act trumps the Arbitration Act when addressing arbitration clauses in consumer warranties because it was enacted

after the Arbitration Act and deals directly with the consumer warranty issue.

The *Walton* court relied exclusively on the favorable treatment of arbitration reflected in the Arbitration Act. *Walton*, 298 F.3d at 474. Thus, the court relied on "a general policy expressed in a prior, less specific statute. The Supreme Court has never invoked similar reasoning in applying the first prong of the *Chevron* inquiry." *Walton*, 298 F.3d at 483 (King, C.J., dissenting). In doing so, the majority in *Walton* failed to recognize the precedence that the Magnuson-Moss Act had over the Arbitration Act in consumer warranty cases such as this one. By approving of the *Walton* rationale, this court has duplicated this error.

Finally, if the Act is viewed in the proper historical context, it is apparent that the disputed terms "informal dispute settlement procedures" and "informal dispute settlement mechanisms" fail to support the *Walton* court's conclusion that the Magnuson-Moss Act was not intended to preclude mandatory binding arbitration. *See Walton*, 298 F.3d at 476. Assuming, *arguendo*, that the Act is unambiguous, these terms must be considered in light of their meaning in 1975, when the Magnuson-Moss Act was enacted. The *Walton* court appears to have erroneously based its conclusion on its belief that, *under today's standards*, "binding arbitration is normally considered to be an 'informal dispute settlement procedure,' and *** therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations." *Walton*, 298 F.3d at 476. That is not the correct context for reviewing the meaning of the statutory language. Statutes are to be construed to effectuate the intent of the drafters *at the time of their adoption*. *Sayles v. Thompson*, 99 Ill. 2d 122, 125 (1983).

In 1975, contractual arbitration outside the context of labor law was not the same highly evolved creation it is today, and binding arbitration was not the norm. Today, binding arbitration is quite formalized, with many of the trappings of traditional litigation, but in 1975, it was in its relative infancy. *See* 4 Am. Jur. 2d *Alternative Dispute Resolution* §1, at 64 (1995). *See* also *Walton*, 298 F.3d at 484 (King, C.J., dissenting). I believe it is error to apply today's standards to determine whether the "informal dispute settlement

procedures" prohibited by the Magnuson-Moss Act include mandatory binding arbitration clauses in consumer warranties. As viewed in 1975, "informal dispute settlement procedures" were equivalent to today's "alternative dispute resolution" and meant any nonjudicial redress mechanisms. *See* 4 Am. Jur. 2d *Alternative Dispute Resolution* §1, at 64-65 (1995).

A leading advocate of arbitration at the time, the American Arbitration Association, referred to arbitration as a settlement mechanism (American Arbitration Association, A Dictionary of Arbitration and Its Terms-Labor-Commercial-International, A Concise Encyclopedia of Peaceful Dispute Settlement 12 (1970)), and the plain and ordinary meaning of the word "arbitrate" included "[t]o submit to settlement or judgment by arbitration" (American Heritage Dictionary of the English Language 87 (1969)). It is a fundamental rule of statutory construction that the plain and ordinary meaning of the language employed by the drafters is the best evidence of their intent. *Lulay v. Lulay*, 193 Ill. 2d 455, 466 (2000). Moreover, the Supreme Court was also contemporaneously using the term "dispute settlement" to include arbitration, reflecting the widely held view that arbitration was a "dispute settlement procedure." *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142, 149-50, 24 L. Ed. 2d 325, 332-33, 90 S. Ct. 294, 298-99 (1969).

Thus, the Magnuson-Moss Act's prohibition of "legally binding" mechanisms (16 C.F.R. §703.5(j) (2003)) is properly interpreted to mean that permissible "informal dispute settlement procedures," including arbitration, may not preclude subsequent judicial redress. Arbitration may, however, be a necessary condition precedent to litigation under the Magnuson-Moss Act. In any case, it may not be the exclusive remedy for claims involving consumer warranties.

This interpretation comports with the primary purpose of the Magnuson-Moss Act, that is, to protect consumers. *See* 15 U.S.C. §2302(a) (2000) (stating the Magnuson-Moss Act was enacted "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products"). The result reached by the majority directly conflicts with this purpose by approving manufacturers' unilateral

inclusion of mandatory, binding arbitration provisions in consumer product warranties. As a practical matter, these warranties are contracts of adhesion, and the binding arbitration provisions are nonnegotiable. Consumers possess disparate bargaining power and are faced with the dilemma of having to either "take it or leave it." *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 72 (1990). Thus, even though the Magnuson-Moss Act was intended to improve competition, under the majority's ruling consumers have no ability to shop for products without these overreaching, binding arbitration provisions. Under these circumstances, permitting manufacturers to cut off consumers' right to a judicial remedy and review cannot be construed as upholding the legislature's true intent in drafting the Magnuson-Moss Act. Such a result flies in the face of Congress' express desire to protect average consumers from harmful overreaching in consumer product warranties. *See* 15 U.S.C. §2303(a) (2000).

For these reasons, as well as those outlined in Justice Rarick's dissent, I respectfully dissent from the majority opinion in this case.

JUSTICE RARICK joins in this dissent.

JUSTICE RARICK, also dissenting:

This appeal presents a single question: Does the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (the Magnuson-Moss Warranty Act) (15 U.S.C. §2301 *et seq.* (1994)) prohibit a seller of consumer goods from requiring purchasers to waive their judicial remedies and submit their warranty claims to binding arbitration? In three separate lawsuits, the circuit court of Cook County held that it did. Based on that conclusion, the court denied motions filed by the seller to dismiss the purchasers' complaints or to compel arbitration and stay the proceedings pending outcome of the arbitration. The seller appealed. The appellate court consolidated the appeals and affirmed. 331 Ill. App. 3d 842. We subsequently granted the seller's petition for leave to appeal. 177 Ill.

2d R. 315. For the reasons that follow, I would affirm the judgment of the appellate court.

The plaintiffs in the cases before us are Michael Borowiec, Tadeusz and Dorota Kobik, and Leslie Waldron. Borowiec's complaint alleged that in November of 1999, he purchased a personal computer from Gateway 2000, now doing business as Gateway, Inc. According to the complaint, Borowiec began experiencing "numerous defects and non-conformities within the computer" shortly after he bought it. Borowiec alleged that Gateway had intentionally or recklessly misrepresented to him that his service contract with Gateway for labor services provided for on-site repair, and that when he requested on-site repair, Gateway refused and required him to bring the computer to a Gateway facility for service. Borowiec further alleged that despite repeated attempts to obtain redress from Gateway pursuant to a warranty which the company had issued when it sold the computer to him, Gateway refused to honor the warranty, and the defects in his computer remain uncorrected.

According to Borowiec's complaint, he revoked acceptance of the computer based on the foregoing acts or omissions by Gateway and filed this action against the company to recover his damages. Borowiec's complaint asserted four claims for relief: (1) breach of written warranty pursuant to the Magnuson-Moss Warranty Act, (2) breach of implied warranty pursuant to the Magnuson-Moss Warranty Act, (3) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1998)) and (4) common law fraud.

The complaint filed by Tadeusz and Dorota Kobik paralleled the one filed by Borowiec. It alleged that the Kobiks purchased their computer from Gateway on or about January 31, 2001, and shortly thereafter "began to experience numerous defects and nonconformities" with the machine. As did Borowiec, the Kobiks asserted that Gateway had intentionally or recklessly misrepresented to them that their service contract with Gateway for labor services provided for on-site repair, and that when they requested on-site repair, Gateway refused and required them to bring the computer to a Gateway facility for service. The Kobiks further alleged that despite

repeated attempts to obtain redress from Gateway pursuant to a warranty which the company had issued when it sold the computer to them, Gateway refused to honor the warranty and the defects in their computer remain uncorrected.

As a result of the defects and nonconformities with the computer, the Kobiks gave written notice to Gateway that they were revoking acceptance of the unit. This litigation followed. As grounds for their complaint, the Kobiks asserted claims for (1) breach of written warranty pursuant to the Magnuson-Moss Warranty Act, (2) breach of implied warranty pursuant to the Magnuson-Moss Warranty Act, and (3) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. Unlike Borowiec, they did not include a count based on common law fraud.

The complaint filed by Leslie Waldron, the fourth plaintiff involved in this litigation, was similar. Waldron alleged that she purchased a computer and services from Gateway in November of 2000. Shortly thereafter, she discovered that the computer was defective. According to Waldron's complaint, the defects and nonconformities in the unit violated both the express written warranty issued to her by Gateway and an implied warranty of merchantability. Waldron contended that despite numerous attempts to have Gateway repair the unit, the defects remain uncorrected. Waldron further contended that Gateway had intentionally or recklessly misrepresented to her that it her service contract with Gateway for labor services provided for on-site repair, and that when she requested on-site repair, Gateway refused and required her to bring the computer to a Gateway facility for repairs. Waldron subsequently revoked acceptance of the computer, which, she alleged, remains in a defective and nonconforming condition, and brought this action against Gateway for damages. Her complaint alleged: (1) breach of a written warranty pursuant to the Magnuson-Moss Warranty Act, (2) breach of an implied warranty pursuant to the Magnuson-Moss Warranty Act, (3) revocation of acceptance pursuant to the Magnuson-Moss Warranty Act, and (4) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

Gateway filed a motion to dismiss Borowiec's complaint, arguing that under the terms of the warranty it issued when it sold the

computer to Borowiec, Borowiec had agreed to waive his right to seek redress in the courts and was obligated by the warranty's provisions to submit any claims he might have to arbitration. In Gateway's view, that arbitration provision in the warranty divested the circuit court of subject matter jurisdiction to consider Borowiec's complaint on the merits.[2] The circuit court was only empowered to compel Borowiec to submit to arbitration.

The circuit court disagreed and denied Gateway's motion to dismiss. Following an unsuccessful effort by Gateway to remove the action to federal court, the company sought interlocutory review in the appellate court pursuant to Supreme Court Rule 307 (188 Ill. 2d R. 307).[3]

In the Kobiks' case, Gateway filed a motion under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(1) (West 1998)) to dismiss the complaint based on the arbitration provision in the warranty issued to the Kobiks when they bought their computer. In the alternative, Gateway asked for an order compelling the Kobiks to submit their claims to arbitration and staying their civil action until the arbitration was completed. Gateway's motion was denied. Immediately thereafter, the company filed a notice of interlocutory appeal pursuant to Supreme Court Rule 307.

Waldron's case proceeded in exactly the same way. Invoking the arbitration clause in the warranty that came with Waldron's computer, Gateway moved to dismiss her complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(1) (West 1998)) or, in the alternative, to compel arbitration and stay proceedings pending the completion of arbitration. As in Borowiec's case and the litigation brought by the Kobiks, that motion was denied and Gateway brought an interlocutory appeal under Supreme Court Rule 307.

The appellate court consolidated Gateway's appeals in each of the three cases and affirmed the orders entered by the circuit court. In ruling as it did, the appellate court noted that under the Federal Arbitration Act (9 U.S.C. §1 *et seq.* (1994)), written contractual provisions requiring arbitration of disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity

for the revocation of any contract." The court further opined, however, that in the case of consumer transactions, Congress has overridden the Federal Arbitration Act through the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (1994)). The court held that the Magnuson-Moss Warranty Act and the regulations adopted by the Federal Trade Commission (FTC) pursuant to the Act prohibit the type of binding arbitration provisions contained in Gateway's warranties. Accordingly, the court concluded that those arbitration provisions are unenforceable. Consistent with that conclusion, the court found that the arbitration provisions cannot operate as a bar to the plaintiffs' claims in circuit court and that Gateway's motions to dismiss or to compel arbitration and stay the circuit court proceedings were therefore properly denied.

In undertaking review of the appellate court's judgment, I begin by noting that the issues before us have arisen in the context of motions to dismiss. A motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *See Busch v. Bates*, 323 Ill. App. 3d 823, 831-32 (2001). For purposes of reviewing a court's ruling on a defendant's motion to dismiss, this court accepts as true the well-pleaded allegations of the plaintiff's complaint. *Board of Managers of the Village Centre Condominium Ass'n v. Wilmette Partners*, 198 Ill. 2d 132, 134 (2001). Motions to dismiss under section 2-619 of the Code of Civil Procedure present a question of law, which we review *de novo*. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 411 (2002).

Central to the dispute before us is Gateway's "Limited Warranty and Terms and Conditions Agreement," which governed the purchase of the computers in all three of the cases at issue here. The "Limited Warranty and Terms and Conditions Agreement" contains a dispute resolution clause, which reads:

"You agree that any Dispute between You and Gateway will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) ***. *** Any decision rendered in such arbitration proceedings will be final and binding on each of the parties ***. *** You understand that You would have had a right

to litigate disputes through a court, and that You have expressly and knowingly waived that right and agreed to resolve any Disputes through binding arbitration. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq."[4]

Section 2 of the Federal Arbitration Act provides, in relevant part:

"A written provision in *** a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1994).

Although plaintiffs in each of the three cases before us asserted in their complaints that they revoked their contracts with Gateway, they do not argue, for the purposes of this appeal, that the revocations avoided the effect of the arbitration requirement in the contracts' dispute resolution clauses. Nor do they dispute that the arbitration requirement would be valid and enforceable under the Federal Arbitration Act, standing alone. Their contention is that the Federal Arbitration Act has been superseded by the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (1994)) in cases involving consumer transactions and that under the Magnuson-Moss Warranty Act and the regulations adopted by the Federal Trade Commission pursuant thereto, arbitration requirements of this kind are prohibited.

The Federal Arbitration Act, 43 Stat. 883, was originally enacted in 1925 and then reenacted and codified in 1947 as title 9 of the United States Code. The purpose of the law was to reverse a longstanding hostility by the courts to arbitration agreements and to place arbitration agreements on the same footing as other contracts. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289, 151 L. Ed. 2d 755, 765, 122 S. Ct. 754, 761 (2002), quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 114 L. Ed. 2d 26, 36, 111 S. Ct. 1647, 1651 (1991). The Supreme Court has construed the Act's provisions as establishing a liberal federal policy favoring arbitration. *Moses H. Cone Memorial*

Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 785, 103 S. Ct. 927, 941 (1983). In accordance with that policy, the Supreme Court has held that courts have a duty to enforce arbitration agreements subject to the Act. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226. 96 L. Ed. 2d 185, 193, 107 S. Ct. 2332, 2337 (1987). The Court has further held, however, that the mandates of the Federal Arbitration Act are not absolute. As with any statutory directives, they may be overridden by a contrary congressional command. *McMahon*, 482 U.S. at 226, 96 L. Ed. 2d at 194, 107 S. Ct. at 2337.

To defeat application of the Federal Arbitration Act based on conflicting federal legislation, the party opposing arbitration of a dispute has the burden of showing that Congress intended to preclude a waiver of judicial remedies for the rights at issue. Such an intent may be discerned from the text of the congressional enactment or the enactment's legislative history or through the existence of an inherent conflict between arbitration and the enactment's underlying purposes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 114 L. Ed. 2d 26, 37, 111 S. Ct. 1647, 1652 (1991).

The Magnuson-Moss Warranty Act, the statute in question here, was enacted in 1975, 50 years after passage of the Federal Arbitration Act. While the Federal Arbitration Act deals generally with contractual arbitration agreements, the Magnuson-Moss Warranty Act was designed for a more specific purpose, namely, "to improve the adequacy of information available to consumers [and] prevent deception" in connection with written warranties issued with consumer products. 15 U.S.C. §2302(a) (1994).

In keeping with its purposes, the Magnuson-Moss Warranty Act sets out clear and comprehensive requirements regarding disclosures, duties, and remedies associated with warranties on consumer products. Products covered by the Act include any "tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes." 15 U.S.C. §2301(1) (1994). There is no dispute that the computers purchased by the plaintiffs in this case fell within this definition and that the warranties issued by Gateway on those computers were subject to the Magnuson-Moss Warranty Act's requirements.

While the Federal Arbitration Act calls for enforcement of arbitration agreements, the Magnuson-Moss Warranty Act specifically provides that where a consumer has been damaged by the failure of a supplier, warrantor or service contractor to comply with any obligation under the Act or under a written warranty, implied warranty or service contract, the consumer "may bring suit for damages and other legal relief *** in any court of competent jurisdiction in any State or the District of Columbia." 15 U.S.C. §2310(d)(1)(A) (1994). An aggrieved consumer is also given the option of suing in federal court if certain restrictions are met. 15 U.S.C. §2310(d)(1)(B) (1994). Moreover, if the consumer "finally prevails" in the litigation, the Act authorizes the court to award the consumer his costs and expenses, including his attorney fees. 15 U.S.C. §2310(d)(2) (1994).

The right conferred on consumers by the Act to seek redress in the courts is subject to two basic conditions. First, where an individual consumer complains that a company obligated under a warranty has failed to comply with its warranty obligations, the consumer must afford the company a reasonable opportunity to cure such failure before he brings suit. 15 U.S.C. §§2310(d)(1), (e) (1994). Second, if a warrantor has established informal dispute settlement procedures that comply with rules established by the Federal Trade Commission, the warrantor may require the consumer to resort to those procedures before pursing any legal remedies in the courts. 15 U.S.C. §2310(a)(3)(C) (1994).

When Congress enacted the Magnuson-Moss Warranty Act, it did not include within the statute itself a detailed listing of the standards a warrantor's informal dispute settlement procedures must meet. Rather, it delegated authority for prescribing the minimum standards for such procedures to the Federal Trade Commission. 15 U.S.C. §2310(a)(2) (1994). Pursuant to that authority, the FTC has adopted a comprehensive set of legislative regulations governing informal dispute procedures. 16 C.F.R. §703.1 *et seq.* (2002). Those regulations provide that the decisions of any informal dispute resolution procedure incorporated into the terms of a written warranty "shall not be legally binding on any person." 16 C.F.R. §703.5(j) (2002). Interpretive regulations adopted by the FTC further provide that a

"warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract." 16 C.F.R. §700.8 (2002).

The FTC's legislative regulations were adopted in 1975. Its interpretive regulations were issued in 1977. Those regulations have now been followed by the FTC for over a quarter century without deviation. As recently as 1999, the FTC reaffirmed its position. In a regulatory review statement published in April of that year, the FTC determined that it would not amend 16 C.F.R. §703.5(j) to allow for binding arbitration and that 16 C.F.R. pt. 703 "will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration." 64 Fed. Reg. 19,700, 19,708-09 (eff. April 22, 1999).

In view of the statutory and regulatory provisions I have just detailed, numerous federal district courts have held that the Magnuson-Moss Warranty Act overrides the mandates of the Federal Arbitration Act and prohibits warrantors from requiring consumers to waive their judicial remedies in favor of binding arbitration where, as here, an express written warranty is involved. *See Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1538-39 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1- [illegible] (M.D. Ala. 1997), *remanded on jurisdictional grounds*, 188 F.3d 1294 (11th Cir. 1999); *Rhode v. E&T Investments, Inc.*, 6 F. Supp. 2d 1322 (M.D. Ala. 1998); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 963-65 (W.D. Va. 2000); *Raesly v. Grand Housing, Inc.*, 105 F. Supp. 2d 562, 573 (S.D. Miss. 2000); *Yeomans v. Homes of Legend, Inc.*, No. 00-D-824-N (M.D. Ala. March 5, 2001); *Brown v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827, 830-31 (E.D. Va. 2002); *see Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002) (King, C.J., dissenting). State trial courts (*see Philyaw v. Platinum Enterprises, Inc.*, No. CL00-236 (Va. Cir. Ct. 2001)), intermediate appellate courts (*see In re Van Blarcum*, 19 S.W.3d 484, 491-92 (Tex. Ct. App. 2000)), and courts of last resort (*see Parkerson v. Smith*, 817 So. 2d 529, 533-35 (Miss. 2002); *Southern Energy*

Homes, Inc. v. Lee, 732 So. 2d 994 (Ala. 1999)) have taken the same view.

The judgment of the appellate court now before us for review adhered to that precedent. Several courts in other jurisdictions have recently adopted a contrary position. A divided three-judge panel of the United States Court of Appeals for the Fifth Circuit has held that the Magnuson-Moss Warranty Act is not an exception to the Federal Arbitration Act and does not preclude warrantors from requiring binding arbitration of claims asserted under written warranties. *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002). Its interpretation is now shared by the Eleventh Circuit (*see Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)) and has been adopted by the Supreme Courts of Texas (*see In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001), *directing appellate court to vacate order in In re Van Blarcum*, 19 S.W.3d 484 (Tex. Ct. App. 2000)), and Alabama (*see Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000), *overruling Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999)) and by appellate courts in Florida (*see Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. App. 2003)), Georgia (*see Results Oriented, Inc. v. Crawford*, 245 Ga. App. 432, 538 S.E.2d 73 (2000), *aff'd*, 273 Ga. 884, 548 S.E.2d 342 (2001)), Louisiana (*see Howell v. Cappaert Manufactured Housing, Inc.*, 819 So. 2d 461 (La. App. 2002)) and Michigan (*see Abela v. General Motors Corp.*, 257 Mich. App. 513, 669 N.W.2d 271 (2003).

Various rationales are advanced in this latter group of decisions to uphold mandatory binding arbitration in the face of the Magnuson-Moss Warranty Act and its attendant rules and regulations. All are premised on the notion that the courts which have invalidated binding arbitration provisions under the Magnuson-Moss Warranty Act have misinterpreted the Act's legislative history and text.[5] Although the latter cases acknowledge that the decisions of the other courts are fully consistent with the FTC's rules and regulations, they argue that the FTC's interpretation of the law is, itself, erroneous and should not be followed.

Gateway urges our court to adopt this reasoning and to reject the view taken by our appellate court and by the tribunals which have

concluded that the Magnuson-Moss Warranty Act forbids warrantors from requiring consumers to forgo their judicial remedies in favor of binding arbitration. A majority of my colleagues has accepted this invitation. I do not.

The Federal Arbitration Act, which applies generally to transactions involving commerce, allows judicial access to be supplanted by arbitration. The legislative scheme created under the more recently enacted Magnuson-Moss Warranty Act, which pertains specifically to warranties on consumer products, does not. Although the Magnuson-Moss Warranty Act makes provision for alternative dispute resolution procedures, those procedures may operate only as precondition to bringing suit. 15 U.S.C. §2310(a)(3)(c) (1994). They may not be imposed as a substitute for legal action, as the FTC's regulations recognize.

Some have attempted to reconcile the two statutes by arguing that the informal dispute resolution procedures contemplated by the Magnuson-Moss Warranty Act are distinguishable from and do not include arbitrations. I have found nothing in the text or legislative histories of the statutes to support such an interpretation. To the contrary, it seems clear to me that the informal dispute settlement procedures referenced by the Magnuson-Moss Warranty Act were intended by Congress to include all mechanisms of redress other than court proceedings, including private arbitration. Current legal scholarship supports this view. A. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 Loy. Consumer L. Rev. 173 (2003).

To hold otherwise would contravene basic principles of statutory construction. If the Magnuson-Moss Warranty Act were read to permit binding arbitration in accordance with the Federal Arbitration Act, warrantors would have no reason to provide consumers with the option of pursing any other type of dispute resolution mechanisms. Warrantors would always opt for binding arbitration because that mechanism would foreclose any subsequent access to the courts by consumers and defeat the consumers' concomitant right to obtain an award of their attorney fees from the courts if they prevailed (*see* 15 U.S.C. §2310(d)(2) (1994)). As a result, the provisions in the

Magnuson-Moss Warranty Act governing informal dispute resolution procedures would be rendered meaningless. That is fatal, for under federal law, as under the law of Illinois, the court has a duty to give effect, if possible, to every clause and word of a statute. Statutes are to be so construed that, if it can be prevented, no clause, sentence, or word is superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 151 L. Ed. 2d 339, 350, 122 S. Ct. 441, 449 (2001), quoting *Duncan, Superintendent, Great Meadow Correctional Facility v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 259, 121 S. Ct. 2120, 2125 (2001).

The claim has been made that rather than thwarting the Magnuson-Moss Warranty Act, enforcement of binding arbitration provisions under the Federal Arbitration Act is actually consistent with the Magnuson-Moss Warranty Act because that statute provides that nothing therein "shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law" (15 U.S.C. §2311(b)(1) (1994)) and consumers, no less than corporations, should have the right to resort to binding arbitration if they so choose. I find this contention unpersuasive. There is no question that informal dispute resolution procedures, including arbitration, can benefit consumers by offering them the opportunity to pursue their claims in a manner that is usually cheaper than litigation, with simpler rules, less formality, and more flexible scheduling. *See Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 280, 130 L. Ed. 2d 753, 768, 115 S. Ct. 834, 842-43 (1995). That is why the Magnuson-Moss Warranty Act encourages warrantors to establish such procedures. *See* 15 U.S.C. §2310(a)(1) (1994). Where arbitration is mandatory and binding, however, and access to courts is foreclosed, the benefits flow primarily to the warrantors. That is why the Magnuson-Moss Warranty Act makes recourse to informal dispute resolution procedures a precondition to litigation rather than a replacement for it.

That arbitration profits warrantors rather than consumers when it is made compulsory and binding is demonstrated by experience. If binding arbitration were advantageous to consumers, one would expect to find instances where warrantors were asking for judicial relief while consumers demanded arbitration. In fact, the reported decisions seem to be uniformly to the contrary. I have searched in

vain for a single instance in the case law where the consumer is the party seeking to avoid litigation through arbitration. In every instance I have seen, the substitution of bindi g arbitration for judicial remedies is a mode of recourse sought by warrantors, not their customers. Accordingly, adherence to the Magnuson-Moss Warranty Act and its opportunities for redress in the courts cannot, in any meaningful sense, be regarded as invalidating or restricting "any right or remedy of any consumer." Indeed, the notion that enforcement of binding arbitration is necessary to protect consumers, notwithstanding the Magnuson-Moss Warranty Act's provision for judicial remedies and statutory attorney fees, turns the Act on its head. It is the same as holding that portions of the Act must be nullified to give the statute effect. I cannot countenance such a construction.

By any reasonable measure, the Magnuson-Moss Warranty Act and the Federal Arbitration Act a,e in irreconcilable conflict. Because the Magnuson-Moss Warranty Act became law five decades after promulgation of the Federal Arbitration Act, we must presume that it was enacted in light of the Federal Arbitration Act. *See Parkerson v. Smith*, 817 So. 2d at 533. In construing federal statutes, courts follow the familiar principle that where statutes are in irreconcilable conflict, as the statutes here are, the more recently enacted law controls over an earlier and more general statute. *See, e.g., Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 949-50 (11th Cir. 2001); *Bolar v. Frank*, 938 F.2d 377, 379 (2d Cir. 1991). Because the statutes before us today cannot be reconciled and because the Magnuson-Moss Warranty Act deals more specifically with written warranties on consumer products, I agree with those courts which have held that the Magnuson-Moss Warranty Act supersedes the Federal Arbitration Act in cases seeking relief based on warranties encompassed by the Magnuson-Moss Warranty Act's provisions.

The regulations enacted by the FTC in accordance with the authority conferred on them by Congress are consistent with that view. As I wrote earlier in this dissent, the FTC's regulations do not allow binding arbitration of disputes concerning written warranties or service contracts. Under those regulations, warrantors are prohibited from including clauses in contracts with consumers that would require consumers to submit their warranty disputes to binding

arbitration. That, however, is precisely what Gateway attempted to do in the consolidated cases before us today.

I reject the notion that the FTC's regulations are not entitled to deference and should be ignored by our court in analyzing the validity of the binding arbitration clause in Gateway's warranties. Such an approach is inconsistent with federal law. The United States Supreme Court has expressly held that legislative regulations adopted by federal administrative agencies are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute pursuant to which they were adopted. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 703, 104 S. Ct. 2778, 2782 (1984). The regulations here do not fall within any of those exceptions.

Adherence to the FTC's regulations is further supported by the United States Supreme Court's precept that considerable weight should be accorded to executive department construction of a statutory scheme it is entrusted to administer. *Chevron*, 467 U.S. at 844, 81 L. Ed. 2d at 704, 104 S. Ct. at 2782. Such deference is particularly appropriate where, as in this case, the agency has interpreted the statutory scheme in a consistent fashion over a considerable period of time. *Barnhart v. Walton*, 535 U.S. 212, 220, 152 L. Ed. 2d 330, 340, 122 S. Ct. 1265, 1270 (2002).

I note, moreover, that unlike the intermediate federal appeals courts whose decisions have been cited by the majority, we are a state court. As such, our authority to reject federal law is more constrained. It is true that state courts normally have jurisdiction to hear claims arising under both federal and state law unless that jurisdiction has been validly limited. It is also true, however, that the federal constitution requires the states to recognize federal law as paramount. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, 69 L. Ed. 2d 784, 791, 101 S. Ct. 2870, 2875 (1981).

I have no doubt that a state court has authority to declare that a federal statute or regulation violates the United States Constitution. I would even concede that a state court may hold that a federal regulation is invalid because it has not been properly enacted. Neither of those circumstances is present here, however. The

regulations at issue in this case, which bar binding arbitration clauses in written warranties, are not claimed to violate the federal constitution, and no argument has been made that the FTC did not follow the proper procedures in adopting them. The majority declines to follow the regulations simply because it disagrees with them. That it may not do.

Properly promulgated agency regulations implementing federal statutes have the force and effect of federal law, which state courts are bound to follow. For a state court to override such regulations would violate the supremacy clause of the United States Constitution. *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989). None of the state courts which have followed the decisions by the federal circuit courts of appeal in *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002), and *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), have recognized this limitation.

Arbitration provisions that violate federal statutory or regulatory provisions, as Gateway's do, are void and unenforceable. *See, e.g., In re Conticommodity Services, Inc.*, No. H-86-4202 (N.D. Ill. May 8, 1987) (arbitration clause which violated regulations of the Commodities Futures Trading Commission was null and void, and the Federal Arbitration Act did not mandate its enforcement). The appellate court was therefore correct in upholding the circuit court's decisions to deny the motions filed by Gateway to dismiss the plaintiffs' respective complaints or to compel arbitration and stay the proceedings pending outcome of the arbitration.

Gateway argues, in the alternative, that even if its binding arbitration provisions are unenforceable with respect to plaintiffs' warranty claims, they can still be applied to require arbitration of plaintiffs' non-Warranty Act claims. This argument is untenable. Because the Magnuson-Moss Warranty Act prohibits inclusion of mandatory binding arbitration provisions in warranties on consumer products, those provisions should not have been in the warranties extended to plaintiffs by Gateway. Because they should not have been included in the warranties, they have no force or effect. We must treat them as if they do not exist. That is the consequence of finding them void and unenforceable. No principle of contract law permits us to excise

the arbitration provisions from the warranties, where they are illegal, and restore them to the agreement in some other place in some other way for some other purpose.

A second, and equally fundamental, flaw in Gateway's argument is that it would require us to overlook the nature of plaintiffs' other claims. Although plaintiffs' complaints include counts alleging violation of Illinois' consumer fraud and deceptive business practices statute and, in one instance, common law fraud, those counts are all premised on the substantive provisions of the warranties issued by Gateway. The statutory consumer fraud counts, for example, are based on the proposition that Gateway's inclusion of the binding arbitration requirement in its warranties is a deceptive practice because under the Magnuson-Moss Warranty Act, warrantors are not, in fact, permitted to represent to consumers that the results of arbitration or other types of informal dispute resolution proceedings will be final and binding.

As with plaintiffs' other claims, the viability of these claims plainly turns on the underlying question of whether Gateway has violated its obligations under the Magnuson-Moss Warranty Act. In this sense, all of plaintiffs' claims are Warranty Act claims. Under the statutory and regulatory scheme adopted by Congress, plaintiffs have the right to litigate such claims in the courts.

For the foregoing reasons, I would affirm the judgment of the appellate court. I therefore respectfully dissent.

JUSTICE KILBRIDE joins in this dissent.

1. As to all the plaintiffs, we note that the claims for violation of the Consumer Fraud Act are premised on the alleged violations of the Magnuson-Moss Act. The plaintiffs allege that Gateway's requirement that the plaintiffs submit the disputes to final and binding arbitration is deceptive and constitutes a violation of the Consumer Fraud Act.

2. Gateway purported to base its motion on section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 1998)). Where, as here, a defendant in a civil action challenges the circuit court's subject matter jurisdiction, dismissal is properly sought under section 2–619(a)(1) of the Code of Civil Procedure (735 ILCS 5/2–619(a)(1) (West 1998)), rather than section 2–615. Sound practice dictates that motions be correctly designated. Nevertheless, reversal based on misdesignation is necessary only if the error has prejudiced the nonmoving party. *See Scott Wetzel Services v. Regard*, 271 Ill. App. 3d 478, 481 (1995). There is nothing in the record before us to suggest that Borowiec suffered any such prejudice. He clearly understood Gateway's position and was able to address it on the merits.

3. Denial of a motion to dismiss and to compel arbitration is appealable under Rule 307, which governs interlocutory appeals as of right, because demanding that court proceedings be halted and that a dispute be sent to arbitration is analogous to a motion seeking injunctive relief. *See Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 496 (2002). Rule 307(a) requires the notice of appeal to be filed within 30 days of the circuit court's order. Although the notice in Borowiec's case was not filed until several months after the circuit court ruled, the filing period was tolled by the removal proceedings (*see Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 155 (1992)), and Gateway does not argue that Borowiec's appeal was untimely.

4. Gateway's binding arbitration provisions have evolved in the wake of court challenges. A prior version specified that arbitrations were to be conducted in accordance with the rules of Conciliation and Arbitration of the International Chamber of Commerce. Those rules required consumers to pay up-front fees that exceeded the cost of most Gateway products and to bear Gateway's legal fees if the consumer did not prevail. In addition, the rules mandated that all arbitrations were to be held in Chicago regardless of where the consumer resided, and that all correspondence regarding the arbitration was to be sent to the International Chamber of Commerce's headquarters in France. In *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1998), the New York Supreme Court, Appellate Division, found this to be unconscionable and therefore invalidated the arbitration agreement to the extent that

it required arbitration before the International Chamber of Commerce. The court in *Brower* was not asked to resolve the more basic question presented by this case, namely, whether the binding arbitration clause violated the Magnuson-Moss Warranty Act.

5. *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (2003), did not directly advance this rationale. It merely cited the *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). Similarly, *Abela v. General Motors Corp.*, 257 Mich. App. 513, 669 N.W.2d 271 (2003), undertook no independent analysis. It simply invoked the decisions of the federal courts of appeals in *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002), and *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), which it felt obliged to follow. To the extent such an obligation existed, it was an obligation the courts of Michigan elected to assume as a matter of Michigan state law. The only federal court whose interpretation of federal law is controlling on state courts is the United States Supreme Court. Neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. If a state court follows a federal circuit court's interpretation of federal law, it does so only because it chooses to, not because it must. *Lockhart v. Fretwell*, 506 U.S. 364, 376, 122 L. Ed. 2d 180, 193, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring). Consistent with this principle, our court has expressly held that decisions of lower federal courts are not conclusive on the courts of Illinois except insofar as the decision of the lower federal court may become the law of the case. *People v. Kokoraleis*, 132 Ill. 2d 235, 293-94 (1989). *See also Bishop v. Burgard*, 198 Ill. 2d 495, 507 (2002); *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999).

MICHAEL BOROWIEC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
E.	)	
	)	No. 00 M1 125578
	)	
GATEWAY 2000, INC.,	)	Honorable
	)	John Laurie
Defendant-Appellant.	)	Judge Presiding.

TADEUSZ KOBIK and	)	
DOROTA KOBIK,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	No. 01 M1 145067
	)	
GATEWAY, INC.,	)	Honorable
	)	James P. McCarthy
Defendant-Appellant.	)	Judge Presiding.

LESLIE WALDRON	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 01 M1 151803
	)	
GATEWAY, INC.,	)	Honorable
	)	James P. McCarthy
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REID delivered the opinion of the court:

The defendant, Gateway, Inc., appeals the trial courts' orders which denied its motions to dismiss. The plaintiffs, Michael

Borowiec, Tadeusz and Dorota Kobik, and Leslie Waldron purchased personal computers from Gateway and subsequently sued in their individual capacities to recover damages alleging: (1) breach of express and implied warranty pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Warranty Act) (15 U.S.C. '2301 et seq. (1994)), (2) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2, (West 1998)) and (3) common law fraud. Gateway moved to have the complaints dismissed pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615. 2-619 (West 1998). The trial courts denied Gateway's motions to dismiss. The cases were subsequently consolidated, and this appeal ensued. The main issue before this court, which is one of first impression, is whether a written warranty governed by the Warranty Act can require a consumer to submit to binding arbitration, or simply, does the Warranty Act preclude binding arbitration? For the reasons that follow, we affirm the decisions of the trial courts.

I
THE FACTS
E. Michael Borowiec

On or about November 18, 1999, Borowiec purchased a Gateway Performance 600 PC computer from Gateway, Inc. (Gateway), which was formerly doing business as Gateway 2000, Inc. The sale and purchase of the computer were subject to Gateway's "Limited Warranty and Terms and Conditions Agreement." Upon receiving the computer in the mail, Borowiec discovered that it was defective. On three different occasions, Borowiec attempted to have Gateway repair the computer. After Gateway failed to repair the computer, Borowiec subsequently revoked acceptance of it and sued to recover damages.

On May 26, 2000, Borowiec filed a four-count complaint against Gateway alleging: (1) violations of the Warranty Act, (2) violation of the Consumer Fraud and Deceptive Business Practices Act, and (3) common law fraud. Gateway filed a motion to dismiss Borowiec's complaint pursuant to section 2-615 for lack of subject matter jurisdiction and to compel arbitration. On September 20, 2000, the trial court denied Gateway's motion to dismiss. Following

an unsuccessful attempt to have the cause removed to federal court, Gateway timely filed a notice of appeal.

E. Tadeusz and Dorota Kobik

On or about January 31, 2001, the Kobiks purchased a Gateway Performance 1000 PC computer and services from Gateway Country Stores LLP (Gateway). The sale and purchase of the computer were subject to Gateway's "Limited Warranty and Terms and Conditions Agreement." Upon receiving the computer, the Kobiks realized that it was defective. After unsuccessfully attempting to have Gateway cure the defects, the Kobiks revoked acceptance of the computer and brought suit against Gateway to recover damages.

On September 13, 2001, the Kobiks filed a three-count complaint wherein they alleged: (1) violations of the Warranty Act, and (2) violations of the Consumer Fraud and Deceptive Business Practices Act. Gateway subsequently filed a motion to dismiss or alternatively to compel arbitration and stay proceedings pending completion of arbitration pursuant to section 2-619. The trial court denied Gateway's motion on November 27, 2001, and Gateway timely filed a notice of appeal.

E. Leslie Waldron

On or about November 14, 2000, Waldron purchased a Gateway Essential 866 computer and services from Gateway Direct LP (Gateway). The sale and purchase of the computer were subject to Gateway's "Limited Warranty and Terms and Conditions Agreement." After receiving the computer in the mail, Waldron discovered that it was defective. After several failed attempts to have Gateway cure the defects, Waldron revoked acceptance of the computer.

On October 19, 2001, Waldron filed a four-count complaint wherein she alleged: (1) violations of the Warranty Act, and (2) violations of the Consumer Fraud and Deceptive Business Practices Act. On November 21, 2001, Gateway filed a motion to dismiss or alternatively to compel arbitration and stay proceedings pending completion of arbitration pursuant to section 2-619. The trial court denied Gateway's motion to dismiss on December 20, 2001, and Gateway timely filed its notice of appeal the same day.

E. Gateway's Warranty Agreement

It is undisputed that Gateway's "Limited Warranty and Terms and Conditions Agreement" governed the purchase of the computers in all three matters. In each of the plaintiffs' "Limited Warranty and Terms and Conditions Agreement" there appears a dispute resolution clause. The dispute resolution clause is identical in all the plaintiffs' warranties and is as follows:

> "You agree that any Dispute between You and Gateway will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) ***. *** Any decision rendered in such arbitration proceedings will be final and binding on each of the parties ***. *** **You understand that You would have had a right to litigate disputes through a court, and that You have expressly and knowingly waived that right and agreed to resolve any Disputes through binding arbitration.** This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq."

E. Consolidation of the Cases

In each of Gateway's motions to dismiss, Gateway argued that dismissal was proper because the "Limited Warranty and Terms and Conditions Agreement" requires all disputes between Gateway and its customers to be resolved through binding arbitration pursuant to the Federal Arbitration Act (FAA) (9 U.S.C '1 et seq. (1994)). In response, the plaintiffs argued that the Warranty Act precludes binding arbitration, and as such, the arbitration agreement in Gateway's warranty is unenforceable. On February 11, 2002, the three cases were consolidated.

II
ANALYSIS

The issue before this court is whether the trial courts erred when they denied Gateway's motions to dismiss pursuant to sections 2 615 and 2 619. "A section 2 615 motion poses the question of

whether the complaint states a cause of action upon which relief can be granted. [Citation.] A section 2 619 motion, on the other hand, raises certain defects or defenses and questions whether defendant is entitled to judgment as a matter of law. [Citation.] Since the resolution of either motion only involves a question of law, the standard of review is de novo. [Citation.] On a motion to dismiss, this court must accept all well pleaded facts as true. [Citation.]" In re Parentage of M.J., 325 Ill. App. 3d 826, 829 (2001).

On appeal, Gateway argues that the trial courts erred when they denied its motions to dismiss pursuant to sections 2-615 and 2-619. Specifically, Gateway maintains that when the plaintiffs accepted the terms in the warranty agreement, they agreed to resolve any dispute with Gateway through binding arbitration, and subsequently, the trial courts erred when they did not dismiss the plaintiffs' complaints and enforce the binding arbitration clause in the warranty.

In reply, the plaintiffs assert that the binding arbitration clause in Gateway's warranty violates the Warranty Act, and as such is unenforceable. In particular, the plaintiffs contend that the Warranty Act preserves for consumers the right to ultimately have their disputes with warrantors settled in a judicial forum and consequently precludes binding arbitration. We agree.

E. The Warranty Act and the FAA

In 1975, Congress enacted the Warranty Act in order "to improve the adequacy of information available to consumers [and] prevent deception" in connection with written warranties issued with consumer products. 15 U.S.C. '2302(a) (1994). The Warranty Act sets out clear and comprehensive requirements regarding disclosures, duties, and remedies associated with warranties on consumer products. Products covered by the Warranty Act include any "tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes." 15 U.S.C. '2301(1) (1994).

In 1925, Congress passed the FAA to reverse the long-standing judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 114 L. Ed. 2d 26, 36, 111 S. Ct. 1647, 1651 (1991); Circuit City Stores, Inc. v.

Adams, 532 U.S. 105, 111, 149 L. Ed. 2d 234, 244, 121 S. Ct. 1302, 1307 (2001). The FAA provides:

> "A written provision in any *** contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. '2 (1994).

The United States Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 87 L. Ed. 2d 444, 458, 105 S. Ct. 3346, 3356 (1985). To further this purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements. Circuit City Stores, Inc., 532 U.S. at 111, 149 L. Ed. 2d at 244, 121 S. Ct. at 1307. Only a contrary congressional command can override the FAA's mandate to enforce arbitration agreements. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 194, 107 S. Ct. 2332, 2337 (1987). Thus, to overcome the presumption favoring arbitration agreements, the party opposing arbitration must show that Congress intended to preclude a party's waiving a statute's judicial remedies. McMahon, 482 U.S. at 227, 96 L. Ed. 2d at 194, 107 S. Ct. at 2337.

The Supreme Court has articulated a test for determining whether a federal statute may override the FAA's directive to enforce arbitration agreements. In essence, this test requires the party opposing arbitration to show a clear congressional intent to override the FAA's mandate to enforce binding arbitration agreements. According to the Supreme Court, this congressional intent must be evidenced in the statute's text, history or through an inherent conflict between arbitration and the statute's purposes. McMahon, 482 U.S. at 226-27, 96 L. Ed. 2d at 194, 107 S. Ct. at 2337. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ***." Moses H. Cone

Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 25, 74 L. Ed. 2d 765, 785 , 103 S. Ct. 927, 941 (1983).

E. Other Jurisdictions

We note that there is a split among the courts that have visited this issue. The cases which support the position that the Warranty Act precludes binding arbitration are as follows: Wilson v. Waverlee Homes, Inc., 954 F. Supp. 1530 (M.D. Ala. 1997); Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423 (M.D. Ala. 1997); Rhode v. E&T Investments, Inc., 6 F. Supp. 2d 1322 (M.D. Ala. 1998); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958 (W.D. Va. 2000); Raesly v. Grand Housing, Inc., 105 F. Supp. 2d 562 (S.D. Miss. 2000); and Philyaw v. Platinum Enterprise, Inc., No. CL00-236 (Va. Cir. Ct. 2001).

We agree with the rationale of these cases and for the reasons that follow, we reject the reasoning of the following cases, which were relied on by Gateway: Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000)(followed the dissent in Southern Energy Homes, Inc. v. Lee, 732 So. 2d 994 (Ala. 1999)); Results Oriented, Inc. v. Crawford, 245 Ga. App. 432, 538 S.E.2d 73 (2000); In re Homestar of Lancaster, 50 S.W.3d 480 (Tex. 2001); and Palm Harbor Home, Inc. v. Turner, 796 So. 2d 295 (Ala. 2001).

E. Text of the Warranty Act

An examination of the Warranty Act's text shows that it was Congress' intent to ultimately preserve a judicial forum for consumers.

The Warranty Act provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. '2310(d)(1) (1994). The Warranty Act recognizes only one exception to this entitlement and, hence, provides for the establishment of "informal dispute settlement mechanisms" (15 U.S.C. '2310(a)(1) (1994)) or "informal dispute settlement procedures" (15 U.S.C. '2310(a)(3) (1994)).

Warrantors may establish "informal dispute settlement mechanisms" to further the congressional goal of encouraging consumers and warrantors to settle their disputes. Section

2310(a)(1) of the Warranty Act states that "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. '2310(a)(1) (1994).

These informal dispute settlement mechanisms are proper so long as they comply with the Federal Trade Commission's (FTC) minimum standards. 15 U.S.C. ''2310(a)(2), (a)(3) (1994). The Warranty Act authorizes the FTC to prescribe rules about the presale disclosure of a written warranty's terms and conditions and the minimum federal requirements for any informal dispute settlement mechanism incorporated in a written warranty. 15 U.S.C. ''2302(b)(1)(A), 2310(a)(2) (1994).

If the informal dispute settlement mechanisms comply with FTC regulations and if the written warranty states that the consumer must resort to this procedure before pursuing any legal remedy, then "the consumer may not commence a civil action *** unless he initially resorts to such procedure." 15 U.S.C. '2310(a)(3) (1994). The Warranty Act states that "in any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." 15 U.S.C. '2310(a)(3)(C) (1994).

In other words, the informal dispute settlement procedures are a prerequisite, not a bar, to relief in court. "[T]he consumer may not commence a civil action *** unless he initially resorts to such procedure." 15 U.S.C. '2310(a) (1994). The consumer must <u>first</u> try to settle his or her dispute with the warrantor by resorting to an informal dispute settlement procedure. If the consumer is dissatisfied with the result reached in the informal dispute settlement, the consumer may then commence a civil action and the results of the informal dispute settlement procedure shall be admissible as evidence.

D. Legislative History of the Warranty Act

A review of the legislative history of the Warranty Act provides further evidence that Congress intended for consumers to retain the right to have their disputes with warrantors decided in the courts. Specifically, remarks made by one of the sponsors of the bill, Congressman Moss, show that the informal dispute settlement

mechanism was intended to act as a prerequisite to consumers seeking relief in the court.

Congressman Moss' remarks follow:

> "First, the bill provides the consumer with an economically, feasible private right of action so that when a warrantor breaches his warranty or service contract obligations, the consumer can have effective redress. Reasonable attorneys fees and expenses are provided for the successful consumer litigant, and the bill is further refined so as to place a minimum extra burden on the courts by requiring as a prerequisite to suit that the purchaser give the [warrantor] reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism which the bill encourages [warrantors] to set up under the general supervision of the Federal Trade Commission." (Emphasis added.) 119 Cong. Rec. 972 (1973)

Congressman Moss' remarks show that the informal dispute settlement mechanisms or procedures are simply a "prerequisite" and not a bar to suit. The mechanisms were created to act as a filter as opposed to a stopper.

The report on the bill makes this point even clearer. The report states that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding, but the decision reached in any informal dispute settlement procedure relating to any matter considered in such procedure would be admissible in any civil action arising out of a warranty on a consumer product." H.R. Rep. No. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7723.

E. FTC Regulations

The regulations adopted by the FTC pursuant to the Warranty Act provide more evidence of an intent that consumers have final access to the courts. In particular, the regulations show that the informal dispute settlement procedure was meant to act only as a prerequisite and not as a bar to a consumer ultimately going to court. The first evidence appears in 16 C.F.R. 700.8 (2001). The section is entitled "Warrantor's decision as final" and states:

> "A warrantor shall not indicate in any written warranty *** either directly or indirectly that the decision of the warrantor *** or any designated third party is final or binding in any dispute concerning the warranty ***. Nor shall a warrantor *** state that it alone shall determine what is a defect under the agreement. Such statements are deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty ***." 16 C.F.R. '700.8 (2001).

Stronger evidence is found further in the regulations. Under the regulations, a "mechanism" is defined as an informal dispute settlement procedure which is incorporated into the terms of a written warranty. 16 C.F.R. '703.1(e) (2001). The regulations require that a "mechanism" comply with the requirements prescribed by the FTC and contained in 16 C.F.R. ''703.3 through 703.8. 16 C.F.R. '703.2(a) (2001). The regulations then state that the "[d]ecisions of the Mechanism shall not be legally binding on any person. *** In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence ***." (Emphasis added.) 16 C.F.R. '703.5(j) (2001).

Moreover, and to bring this point further home, the regulations add that "The mechanism shall inform the consumer *** that *** [i]f he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued." 16 C.F.R. '703.5(g) (2001).

Finally, if any doubt remains about whether the Warranty Act precludes binding arbitration agreements, our examination of the remarks made by the FTC upon adopting 16 C.F.R. ' 703.5(j) show that binding arbitration is precluded under the Warranty Act. The FTC's comments are as follows:

> "Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration).

> The Rule does not allow for this for two reasons. First, *** Congressional intent was that Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but nonjudicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." 40 Fed. Reg. 60168, 60210 (1975).

The Commission goes on to state:

> "The warrantor, the Mechanism, or any other group can offer a binding arbitration option to consumers who are dissatisfied with Mechanism decisions or warrantor intentions. However, reference within the written warranty to any binding, nonjudicial remedy is prohibited by the Rule and the Act." 40 Fed. Reg. at 60211.

Here, Gateway's "Limited Warranty and Terms and Conditions Agreement" contains a binding arbitration clause. This clause is in violation of the Warranty Act and is therefore unenforceable. As such, the trial courts' decisions are affirmed.

III
CONCLUSION

For the foregoing reasons, the decisions of the trial courts are affirmed.

Affirmed.

Atty. No. 34110

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

LESLIE WALDRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 01 M1 151803
	)	
GATEWAY,	)	Amount claimed: $2,500
Defendant.	)	

ORDER

This cause coming to be heard on Defendant's §2-619 Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration, the matter having been briefed and argument have been heard.

IT IS HEREBY ORDERED THAT Defendant's§2-619 Motion to Dismiss or Alternatively, to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration is denied.

ENTERED:

S/Judge James P. McCarthy

Judge James P. McCarthy
Dec 02 2001
Circuit Court – 1685

Atty. No. 34110
Marshall L. Blankenship
Adducci, Dorf, Lehner, Mitchell
& Blankenship, P.C.
150 North Michigan Avenue, Suite 2130
Chicago, Illinois 60601
312/781-2800

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

TADEUSZ KOBIK and DOROTA KOBIK,	)	
Plaintiffs,	)	
v.	)	No. 01 M1 145067
GATEWAY,	)	
Defendant.	)	

ORDER

This cause coming to be heard on Defendant's §2-619 Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration, the matter having been briefed and argument have been heard.

IT IS HEREBY ORDERED THAT:

(1) Defendant's§2-619 Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration is DENIED.

ENTERED:

S/Judge James P. McCarthy

JUDGE JAMES P. MCCARTHY
NOV 27, 2001
Circuit Court – 1685

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ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Michael Borokiec

0000145.2959
2000

v.

NO. 00 M1 125578

Gateway 2000

ORDER

This matter coming before this Honorable Court pursuant to Defendant's motion to Dismiss, due notice having been given, and the Court having been presented with oral argument.

It is hereby ordered:

(1) Defendant's Motion to Dismiss is denied for the reasons stated in open court.
(2) Defendant shall Answer Plaintiff's Complaint by October 19, 2000.
(3) Defendant shall respond to Plaintiff's written discovery by October 19, 2000.
(4) Defendant's motion to admit Robert Poder pro hoc vice is granted.

Atty No. 33599
Name Scott Cohen
Attorney for II
Address 120 W. Madison
City / Zip Chicago
Telephone 578-9428

ENTER:
S/Judge James P. McCarthy
Judge **Judge's No.**

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-5/12/00(0348066

ORIGINAL-COURT FILE

(2)

No. 04-3

Supreme Court, U.S.
FILED
AUG 2 4 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL BOROWIEC, et al.,

Petitioners,

v.

GATEWAY 2000, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Illinois Supreme Court err when it concluded, consistent with rulings of every federal circuit and state supreme court that has addressed the issue, that petitioners had failed to establish that Congress intended the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, to override – and therefore partially repeal – the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, which makes the arbitration agreement between petitioners and respondent "valid, irrevocable and enforceable"?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Gateway Companies, Inc. hereby discloses that it is a wholly-owned subsidiary of Gateway, Inc., a publicly traded company. Currently, no publicly held company owns more than ten percent (10%) of Gateway, Inc.'s common stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Gateway Companies, Inc. ("Gateway") respectfully opposes the petition for writ of certiorari. The Illinois Supreme Court held that the Magnuson-Moss Warranty Act ("Warranty Act") does not prohibit binding arbitration of petitioners' disputes with Gateway. In so doing, that court applied settled precedent from this Court holding that statutory claims are subject to arbitration unless Congress clearly intended to preclude arbitration, and that intent is found in the statute's "text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (internal quotation omitted). Nevertheless, petitioners ask this Court to grant their petition to correct the Illinois Supreme Court's alleged failure to properly apply *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, even if the Illinois Supreme Court erred in failing to properly apply *Chevron* – and it did not – that fact alone is not a sufficient reason for this Court to grant review. The Illinois Supreme Court's decision is in accord with the decisions of every federal appellate court and state supreme court to resolve the issue. The decision is also correct and fully consistent with this Court's precedent.

COUNTERSTATEMENT OF THE CASE

Each petitioner purchased a personal computer from Gateway or one of its related companies and in separate actions sued to recover damages for, *inter alia*, alleged breaches of express and implied warranties under the Warranty Act and alleged violations of the Illinois Consumer

Fraud and Deceptive Business Practices Act, 815 ILCS 505/2. Gateway moved to dismiss petitioners' suits, or alternatively, to compel arbitration and stay proceedings under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), because each petitioner had agreed to arbitrate "any dispute, controversy, or claim arising out of or relating to" the sale of the computer.

In response, petitioners argued that the Warranty Act overrides the FAA and prohibits binding arbitration of their claims. Without written decision, the trial court in each case denied Gateway's motions to dismiss with respect to all of petitioners' claims. Gateway appealed and the Illinois Appellate Court consolidated the three cases for argument and decision.

On May 31, 2002, the Appellate Court affirmed the trial courts' denials of Gateway's motions to dismiss. That court held, as a matter of federal law, that the Warranty Act repeals the FAA and thereby precludes arbitration of consumer warranty claims. Gateway filed a timely petition for leave to appeal to the Illinois Supreme Court, and that court granted the petition on November 4, 2002.

In a decision issued April 1, 2004, the Illinois Supreme Court reversed the judgment of the Illinois Appellate Court. Pet. App. 2 (published at *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004)). The court explicitly applied the test announced in *McMahon* for determining whether a subsequent act of Congress repeals and overrides the FAA. *Id.* at 8-9 (quoting recitation of *McMahon* test in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) and stating that petitioners' claims are subject to arbitration "unless [petitioners] show that Congress intended to preclude a waiver of a judicial forum

for their federal statutory claims"). In applying this test, the Illinois Supreme Court relied heavily on the analysis contained in two federal appellate court decisions, *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), *cert. denied*, 538 U.S. 945 (2003), and *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002). It reviewed the *McMahon* test as applied by those two courts, and the reasons those courts gave for declining to defer to the Federal Trade Commission's ("FTC") regulation that purports to prohibit binding arbitration of consumer warranty claims. In light of this uniform federal appellate court authority on the question, the Illinois Supreme Court held that the Warranty Act does not preclude binding arbitration of warranty claims. Pet. App. 19.

Petitioners did not seek a stay in the Illinois Supreme Court pending the filing of their petition. Therefore, the cases were returned to the trial courts. Consistent with the Illinois Supreme Court's decision, petitioners initiated arbitrations, and those proceedings are moving forward.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for several reasons. *First*, the decision of the Illinois Supreme Court does not conflict with any decision of this Court, or of any other court of appeals or state supreme court. Every federal appellate court and state supreme court to consider the question has reached the same conclusion: the Warranty Act does not override the FAA and does not prohibit binding arbitration of consumer warranty claims. Petitioners cite an evenly divided Mississippi Supreme Court decision as evidence of a split, but that decision is not

legally binding in Mississippi and, in any event, relied on cases that have since been overruled. This Court denied a petition for writ of certiorari on this precise question just last year, *see Davis v. Southern Energy Homes, Inc.*, 538 U.S. 945 (2003) (No. 02-1117, *cert. denied*, March 31, 2003), and in light of subsequent decisions that have further solidified the growing consensus of federal and state courts on the issue, there is even less reason now to revisit that decision.

Second, the central claim of the petition – that the Illinois Supreme Court failed to properly apply *Chevron* – presents a question of error correction that does not warrant this Court's review. Although petitioners suggest this Court should review the Illinois Supreme Court's decision because it invalidated an agency regulation, this suggestion is misplaced. True, the Illinois Supreme Court rejected the FTC's interpretation of one of its regulations, but that regulation retains validity in all other contexts. In any event, there is no evidence that the FTC considers its interpretation an important one. In the more than 25 years since it enacted the regulation, the FTC has not initiated a single enforcement proceeding to test its interpretation. Thus, the only question presented by this petition is whether the Illinois Supreme Court properly applied *Chevron*. Although petitioners believe that the Illinois Supreme Court erred in its application of *Chevron*, that issue does not merit review, especially because, as described below, the Illinois Supreme Court's decision is fully consistent with *Chevron* and all of this Court's governing precedents, including *Household Credit Services, Inc. v. Pfennig*, 124 S. Ct. 1741 (2004), cited by petitioners.

Third, the Illinois Supreme Court's decision is correct. Under the FAA, courts must "rigorously enforce agreements to arbitrate," even when faced with statutory claims. *McMahon*, 482 U.S. at 226 (quotation omitted). This presumption in favor of arbitrability of statutory claims can be overcome only if "the party opposing arbitration" proves that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227. Further, if Congress did intend to preclude arbitration of statutory claims, this intent must be evident in the text, legislative history, or "an inherent conflict between arbitration and the statute's underlying purposes." *Id.*

Applying these standards in this case, the Illinois Supreme Court properly held that petitioners had not overcome the presumption in favor of arbitrability of statutory claims. The text of the Warranty Act does not even mention arbitration, much less prohibit it. The legislative history of the Warranty Act similarly fails to reveal a congressional intent to prohibit arbitration. Indeed the only relevant legislative history demonstrates that Congress expressly contemplated that arbitration would be available (as an alternative to litigation) to resolve Warranty Act claims.

With no support in the text or legislative history, petitioners rely heavily on an FTC regulation which purports to prohibit binding arbitration of Warranty Act claims. But agency interpretations of a statute are simply irrelevant to the *McMahon* inquiry. It is Congress's intent, not an agency's intent, that matters when deciding whether one statute overrules a prior statute. This Court made that very point just last year when it emphasized that administrative policy preferences cannot overrule prior acts of Congress. *FCC v. NextWave Pers. Communications,*

Inc., 537 U.S. 293, 304 (2003). In any event, even if the FTC had been delegated authority to overrule a prior act of Congress – and it has not been – its views would not be entitled to deference under *Chevron* because they rest on an outmoded hostility to arbitration that has since been rejected by this Court.

I. THERE IS NO CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

Petitioners suggest that this Court should grant the petition to resolve an important conflict in the lower courts and bring uniformity to the law. Although the question presented is certainly an important one, petitioners fail to explain that federal and state courts have reached an essentially uniform consensus on that question. Thus, there is no conflict to resolve because every federal appellate court and state supreme court to decide the question has held, consistent with the Illinois Supreme Court in this case, that the Warranty Act does not prohibit binding arbitration. Pet. App. 2; *Davis*, 305 F.3d 1268; *Walton*, 298 F.3d 470; *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000); *Abela v. General Motors Corp.*, 677 N.W.2d 325 (Mich. 2004).[1]

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[1] *See also Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd on other grounds*, 548 S.E.2d 342 (Ga. 2001); *Howell v. Cappaert Manufactured Hous., Inc.*, 819 So. 2d 461 (La. Ct. App.), *writ denied*, 827 So. 2d 1161 (2002); *Dombrowski v. General Motors Corp.*, 318 F. Supp. 2d 850 (D. Ariz. 2004); *Pack v. Damon Corp.*, 320 F. Supp. 2d 545 (E.D. Mich. 2004); *Sikes v. Ganley Pontiac Honda*, No. 79015, 2001 WL 1075726 (Ohio App. 8th Dist. Sept. 13, 2001).

In light of these developments, the *only* aberrant jurisdictions that still adopt the position advocated by petitioners (*i.e.*, that the Warranty Act precludes arbitration) are two federal district courts and one state trial court in Virginia (all of which issued their decisions before *Davis* and *Walton*), and a federal district court decision in Ohio.[2]

In search of a split in authority, petitioners seek refuge in the Mississippi Supreme Court's decision in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), but that decision does not help them. In *Parkerson*, an evenly divided Mississippi Supreme Court affirmed an intermediate appellate court's holding that the FAA did not mandate enforcement of arbitration clauses within written warranties. However, *Parkerson* is not even legally binding in Mississippi on this point because only four of eight Justices approved this holding; three Justices clearly rejected it and one Justice, while concurring in the result, expressed no opinion on the matter. *See Buffington v. Mississippi*, 824 So. 2d 576, 580 (Miss. 2002) ("It is true that a majority of all sitting judges is required to create precedent, and therefore, it follows that a plurality vote does not create a binding result.") (internal quotation omitted). In any event, the *Parkerson* plurality relied on the district court decisions that were expressly overruled by *Davis* and *Walton*.

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[2] *See Browne v. Kline Tysons Imports, Inc.* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107 (Va. Cir. Ct. Jan. 9, 2001); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910 (N.D. Ohio 2003).

In sum, the law is uniform and there is no split for this Court to resolve. The federal appellate courts and state courts of last resort have reached a unanimous conclusion: the Warranty Act permits binding arbitration.

II. PETITIONERS' MAIN ARGUMENT – THAT THE ILLINOIS SUPREME COURT ERRONEOUSLY APPLIED *CHEVRON* – CALLS FOR MERE ERROR CORRECTION AND THUS DOES NOT MERIT REVIEW BY THIS COURT.

Petitioners suggest this Court should grant review because the Illinois Supreme Court erroneously applied *Chevron* to invalidate an agency regulation. This request for error correction does not merit review.

As a preliminary matter, the Illinois Supreme Court's decision does not invalidate an agency regulation. The FTC has adopted a series of regulations to govern "informal dispute settlement mechanisms" ("IDSMs") under the Warranty Act, and has interpreted one of those regulations, 16 C.F.R. § 703.5, to prohibit binding arbitration. The Illinois Supreme Court's decision rejects that interpretation, but the FTC regulation itself retains full force to govern IDSMs under the Warranty Act.

While petitioners suggest that the rejection of an FTC interpretation of a regulation is an important event warranting intervention by this Court, *see, e.g.*, Pet. at 19, it is worth noting that the FTC itself has not demonstrated a similar level of concern about this regulation. The FTC is empowered to restrain warrantors from failing to comply with any requirement of the Warranty Act. 15 U.S.C. § 2310(c)(1). Yet, since it enacted its regulations more than 25 years ago, it has never once initiated an

enforcement action to test its interpretation or to restrain the thousands of warrantors who are supposedly violating the Act. It is hardly worth this Court's time to review an agency interpretation that the agency itself cannot be bothered to enforce.

At base, then, petitioners' argument reduces to a claim that the Illinois Supreme Court failed to defer to an agency regulation under *Chevron*. Even if this were true, petitioners' argument is nothing more than a request for error correction, and as such, it does not merit review by this Court. *See* Sup. Ct. Rule 10. This is especially true here because, as described below, the Illinois Supreme Court did not err. Like all the state supreme courts and federal appellate courts to consider the question, the Illinois Supreme Court properly declined to defer to the FTC's interpretation of the Warranty Act.

III. THE ILLINOIS SUPREME COURT CORRECTLY CONCLUDED THAT THE WARRANTY ACT DOES NOT PROHIBIT ARBITRATION.

According to petitioners, the Illinois Supreme Court erred because it failed to defer to an FTC regulation under *Chevron*. The Illinois Supreme Court did not err, however, because the FTC's regulations are completely irrelevant to the legal standards governing this case.

The central issue in this case is whether Congress in enacting the Warranty Act partially repealed the FAA, which otherwise makes all agreements to arbitrate "valid, irrevocable and enforceable." This Court has repeatedly instructed courts that they may not find that a subsequent act of Congress overrides the FAA unless Congress "*explicitly* preclude[s] arbitration" of claims under the later-enacted

statute. *Gilmer*, 500 U.S. at 29 (emphasis added). Furthermore, the party seeking to avoid arbitration (here, petitioners) bears the burden of demonstrating that Congress clearly intended to preclude arbitration, an intent that, if it exists at all, must be found in "[the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citation omitted). Evidencing the stringent nature of these requirements, no decision of this Court holds that Congress intended a later act to repeal the FAA and prohibit arbitration.

The Warranty Act is no exception. Although petitioners do not cite the *McMahon* test or make any attempt to apply it, that test controls the outcome here. There is nothing in the text, legislative history, or purposes of the Act that demonstrates a congressional intention to prohibit arbitration. And under the *McMahon* test, the FTC's regulations are simply irrelevant. But even if they were relevant, the Illinois Supreme Court properly declined to defer to the FTC's interpretation because it is an unreasonable interpretation of the Warranty Act.

A. Neither the Text, Legislative History, nor Purposes of the Warranty Act Demonstrates a Clear Congressional Intent to Prohibit Arbitration.

1. The plain language of the Warranty Act does not repeal the FAA or prohibit arbitration of consumer warranty disputes. In fact, the text and stated purpose of the Warranty Act do not mention arbitration at all. In other words, nowhere in the language of the Warranty Act does Congress expressly preclude binding arbitration of consumer claims arising under the Act, or even suggest that

arbitration of consumer warranty claims was a congressional concern. *See* Pet. App. 12-13 (quoting *Walton*), 14-15 (describing *Davis*); *Davis*, 305 F.3d at 1274-75; *Walton*, 298 F.3d at 475-76.

Indeed, a separate provision of the Act definitively repudiates any argument that Congress intended to preclude arbitration of Warranty Act claims. Section 111(b)(1) of the Act, 15 U.S.C. § 2311(b)(1), states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." Congress explicitly preserved consumers' existing rights to arbitrate claims under the FAA, including the right to enforce arbitration agreements to which the consumer is a party. *See Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 281 (1995) (recognizing that ability to enforce arbitration agreements is an important right for consumers). This provision thus expressly negates any implied repeal of the FAA, and the rights and remedies it protects, by the Warranty Act.

Conspicuously, petitioners do not even cite the savings clause, much less point to any finding that Congress clearly intended to deprive consumers of the important rights and remedies provided by the FAA. And for good reason. The broad savings clause of Section 111(b) makes such a finding absolutely impossible. For it expressly instructs courts *not* to interpret the statute in precisely the manner petitioners do.

In the absence of any direct language precluding arbitration and with no discussion of the savings clause, petitioners rely on two arguments to support their assertion that the Warranty Act prohibits binding arbitration. Neither of these arguments supports their cause.

First, petitioners rely on Section 110 of the Warranty Act, 15 U.S.C. § 2310, which authorizes warrantors to create an informal dispute settlement mechanism, and argue that arbitration must fall within the scope of this new IDSM. Pet. at 16. But because the Warranty Act does not define the term IDSM, this argument rests entirely on inferences. Yet, as this Court has repeatedly held, inference is not enough. A subsequent act of Congress does not repeal the FAA unless Congress "explicitly" precludes arbitration. *Gilmer*, 500 U.S. at 29.

In any event, petitioners' argument is meritless. Section 110 is concerned with establishment of IDSMs, not arbitration. The gist of the new IDSM under Section 110 is to allow a warrantor to incorporate in its written warranty "a requirement that the consumer resort to such procedure [*i.e.*, an IDSM] before pursuing any legal remedy under this section respecting such warranty," in which case the consumer "may not commence a civil action (other than a class action)" under the remedies provision of Section 110(d) without first resorting to that procedure. *Id.* § 2310(a)(3)(C). *See also id.* § 2310(d)(1).

Therefore, in enacting the Warranty Act, Congress gave consumers a new statutory cause of action and provided warrantors with the option of establishing IDSMs that consumers would need to use *before* pursuing the new remedy. However, the mere fact that Congress provided consumers with a remedy that could arise after completing an IDSM does not mean that consumers could not choose to pursue that statutory remedy in an arbitration proceeding rather than a judicial forum.

Moreover, allowing warrantors to establish an *IDSM* that they may require consumers to resort to as a prerequisite to

filing a lawsuit does not evince a congressional intent to preclude *arbitration*. For the Warranty Act speaks only of an "informal dispute settlement mechanism." As both the Third and Fifth Circuits have explained, arbitration is not the same as an IDSM. *Walton*, 298 F.3d at 476 ("binding arbitration is not normally considered to be an 'informal dispute settlement procedure' "); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3rd Cir. 1997) ("[T]he informal dispute resolution mechanism provided [by the Warranty Act] *does not constitute arbitration* within the meaning of the FAA.") (emphasis added). Furthermore, while the Warranty Act provides for an IDSM, it also states that that procedure must be used *before* filing suit in court; arbitration, however, is "generally . . . understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton*, 298 F.3d at 475.

Finally, to conclude that Congress foreclosed *any* arbitration remedy, a court would necessarily have to find that Congress preempted each state's adoption of the Uniform Arbitration Act, which, like the FAA, makes arbitration agreements binding and enforceable without regard to the subject matter of the parties' dispute. Principles of federalism, however, preclude a finding of preemption unless that was the "clear and manifest intent" of Congress, a standard that petitioners have not even attempted to demonstrate in this case. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002).

Second, petitioners suggest that despite the clear command of *McMahon*, this Court should not insist on an explicit statement from Congress to preclude arbitration because, when the Warranty Act was enacted in 1975, arbitration was not widely used as a means for resolving consumer disputes. Pet. at 17-18 & n.4. However, this

identical argument could be made about many of the statutes that this Court has evaluated to determine whether they preclude arbitration. For example, the Securities Act of 1933, the Securities Exchange Act of 1934, the Truth in Lending Act (originally enacted in 1968), and RICO (enacted in 1970) – all of which can be enforced by consumers – were all passed well before the Warranty Act, and hence (according to petitioners) before arbitration had become a widespread alternative to litigation for consumers. Yet, this fact did not stop this Court from insisting on an express statement from Congress that it intended to preclude arbitration in any of those statutes. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989); *McMahon*, 482 U.S. at 232, 242; *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). Because this Court required an express statement in those cases, there is no basis for excusing that requirement here.

In sum, an analysis of the text of the Warranty Act demonstrates that Congress did not express an intent to prohibit binding arbitration of consumer warranty claims.

2. As with its text, there is not a shred of evidence in the Warranty Act's legislative history that suggests Congress intended to preclude arbitration. In fact, the relevant legislative history shows that Congress knew the difference between arbitration and IDSMs and expressly contemplated arbitration of consumer warranty claims that could not be settled informally. Senators Magnuson and Moss introduced the first version of a consumer warranty bill in 1969. In 1970, the Senate Committee on Commerce issued a report interpreting the language of this forerunner of the Warranty Act. S. Rep. No. 91-876 (1970). That Senate Report states that "it is Congress'

intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances *without the aid of litigation or formal arbitration.*" *Id.* at 22-23 (emphasis added). Congress thus clearly understood that litigation and arbitration were equivalent alternatives if informal dispute *settlement* efforts failed.

Thus there is absolutely no evidence from its legislative history that Congress intended to prohibit arbitration or override the provisions of the FAA, let alone the clear expression of congressional intent required by *McMahon* and *Gilmer*. To the contrary, the only proper evidence of the Act's legislative history shows that Congress harbored no such intent.

3. Petitioners obliquely address the final part of the *McMahon* inquiry (whether arbitration conflicts with the Warranty Act's purposes) when they argue that the Illinois Supreme Court's decision allowing arbitration of Warranty Act claims harms consumers and thereby undermines the Warranty Act. Pet. at 19-20. Nothing could be further from the truth.

It would be futile to argue that there is any conflict between arbitration and the Warranty Act's express purpose "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). As this Court has repeatedly reminded courts, "by agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial,

forum." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer*, 500 U.S. at 26).

There is, in fact, "no inherent conflict between the [Warranty Act] and the FAA." *Walton*, 298 F.3d at 478. Indeed, arbitration promotes the purposes of the Warranty Act insofar as it provides consumers with a cost-effective, streamlined procedure to resolve their claims. This Court has repeatedly emphasized these pro-consumer benefits of arbitration. In *Terminix*, for example, this Court noted that "Congress, when enacting [the FAA], had the needs of consumers . . . in mind." 513 U.S. at 280. The relative inexpensiveness of arbitration is "helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Id.* For consumers, "who seek[ ] . . . the value of only a defective refrigerator or television set," the costs and delays of litigation could "eat up the value of an eventual small recovery." *Id.* at 281. Consumers also benefit from arbitration in the form of cost savings passed on to them from the seller's reduced exposure to costly court litigation. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (Customers "benefit [from arbitration] in the form of reduced [prices] reflecting the savings that [the seller] enjoys by limiting the fora in which it may be sued.").

Accordingly, the FAA promotes and complements the pro-consumer goals of the Warranty Act. Because the FAA and the Warranty Act are "two statutes . . . capable of coexistence," it is this Court's "duty" to regard "each as effective." *NextWave*, 537 U.S. at 304 (internal quotations omitted). That is precisely what the Illinois Supreme Court did in this case.

B. The Illinois Supreme Court Correctly Declined to Defer to the FTC's Unreasonable Interpretation of the Warranty Act.

Given the lack of any *text, history, or purpose* to support its interpretation of the Warranty Act, petitioners seize on an FTC regulation, 16 C.F.R. § 703.5, and the FTC's statements about that regulation, to argue that the Warranty Act overrides the FAA and prohibits arbitration of Warranty Act claims. Reliance on these FTC statements is unwarranted, however, because the FTC's views are irrelevant to the *McMahon* standard, and in any event, they are not entitled to any deference.

1. Although the FTC has authority to implement portions of the Warranty Act, it has no authority to interpret the Warranty Act to override the FAA. Under the *McMahon* standard, it is the intent of Congress, not an agency, that is determinative in deciding whether a subsequently enacted statute abrogates the FAA's emphatic federal policy making arbitration agreements binding, irrevocable and enforceable. *See McMahon*, 482 U.S. at 234 n.3 (rejecting reliance on long-standing agency rule that Exchange Act precluded arbitration). Thus, the Fifth Circuit rejected reliance on the FTC's regulations, stating that "[a]n agency's regulations, promulgated pursuant to a statute, are not part of [the *McMahon*] test." *Walton*, 298 F.3d at 479. Simply put, because an agency's regulations cannot determine whether one Congress intended to override the acts of a prior Congress, they are irrelevant to the central question governed by the *McMahon* test.

This conclusion – that agency interpretations are irrelevant under the *McMahon* standard – is merely an application of the basic principle, recently reaffirmed by

this Court in *NextWave*, that an agency may not interpret a statute to deny the clear rights provided in a different act of Congress. As this Court expressly held in *NextWave*, "administrative preferences cannot be the basis for denying respondent rights provided by the plain terms of a law." 537 U.S. at 304.

Similarly, here, the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and this guarantee provides significant rights for consumers and other signatories to arbitration agreements. *See Terminix*, 513 U.S. at 281. Nevertheless, as in *NextWave*, the FTC has interpreted the Warranty Act to prohibit binding arbitration of claims arising under that Act, thereby denying consumers and warrantors their rights under the plain terms of the FAA. Because, as in *NextWave*, the Warranty Act does not *require* this interpretation, the FTC's policy preference "cannot be the basis for denying . . . rights provided by the plain terms of a law." 537 U.S. at 304. In short, because there is no inherent conflict between the Warranty Act and the FAA, this Court has a "duty" to regard "each as effective," *id.*, regardless of the FTC's preference to the contrary.

2. Even if the FTC's regulation were relevant to determining whether one act of Congress (the Warranty Act) overrides another act (the FAA) the Illinois Supreme Court properly declined to defer to the FTC's views. An agency's interpretation is entitled to *Chevron* deference only if Congress has not spoken to the precise question at issue – if, in other words, the statute is silent or ambiguous on the topic. *Household Credit*, 124 S. Ct. at 1746-47; *see Chevron*, 467 U.S. at 843-44. But here, if the Warranty Act is silent or ambiguous regarding arbitration, then, by definition, Congress has not clearly expressed its intent to

override the FAA as required by *McMahon*. *See supra* at 9-10. In short, the factual predicate for *Chevron* deference – silence or ambiguity in the statutory language – refutes any argument that Congress explicitly precluded arbitration, as required by *McMahon*, when it enacted the Warranty Act.

3. In any event, the FTC's interpretation is unreasonable. Section 703.5(j) of the FTC's regulations provides that "[d]ecisions of the [IDSMs] shall not be legally binding on any person." Although the FTC never expressly states that "IDSM" should be interpreted broadly to include all non-judicial dispute resolution processes (including arbitration), the FTC has indicated that it interprets Section 703.5(j) to preclude binding arbitration. *See* 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975). The FTC explained that it had adopted this interpretation because "[t]he Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." *Id.* In 1999, the FTC reaffirmed this original rationale, stating expressly that it "believes that this interpretation continues to be correct." 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999). The FTC further stated that its interpretation rested on the language of the Act providing that "the consumer may not commence a civil action . . . *unless he initially resorts to such* [informal dispute settlement] *procedure*." *See id.* (quoting 15 U.S.C. § 2310(a)(3)). According to the FTC, "this language clearly *implies* that a mechanism's decision cannot be legally binding, because if it were, it would bar later court action." *Id.* (emphasis added).

The Illinois Supreme Court properly rejected reliance on the FTC's regulation. The FTC's asserted justifications

for its regulation are unreasonable because they all conflict with this Court's precedent. The FTC's 1975 statement that arbitration might not adequately protect consumers is based on an inappropriate hostility to arbitration, and therefore an impermissible reading of the statute. This Court "in *McMahon* . . . rejected this same hostility shown by the SEC." *Davis,* 305 F.3d at 1279; *see McMahon*, 482 U.S. at 234 n.3.

Furthermore, the FTC's 1999 statement that the language of Section 110 "clearly *implies* that a mechanism's decision cannot be legally binding," is similarly inconsistent with this Court's precedent. For, even if arbitration were deemed an IDSM – which defies all evidence to the contrary – mere "implication" is *never* enough to override the provisions of the FAA. *See Gilmer*, 500 U.S. at 27-30; *McMahon*, 482 U.S. at 236-38.

Finally, if it is the FTC's position that the provision of a civil remedy in Section 110(d) precludes arbitration, that rationale also cannot survive modern precedent interpreting the arbitration of statutory claims under the FAA. This Court has repeatedly rejected arguments that claims under employment discrimination laws, the federal antitrust laws, RICO, and the securities laws, all of which provide for civil actions just like Section 110(d), are not subject to arbitration. This precedent requires that Section 110 of the Warranty Act be interpreted as providing an informal, non-binding settlement mechanism to be followed by arbitration *or* a civil action if the consumer were

dissatisfied with the informal settlement result. *See Gilmer*, 500 U.S. at 29.[3]

At base, the FTC and petitioners have each made the same mistake. They have failed to accept, or even acknowledge, what this Court has repeatedly emphasized about arbitration – namely, that an agreement to arbitrate does not result in a loss of substantive rights, but merely transfers a dispute concerning those substantive rights from a judicial to an arbitral forum. Because "the FTC's motive behind [those] regulation[s] is contradictory to Supreme Court rationale," *Davis*, 305 F.3d at 1279, the Illinois Supreme Court properly concluded that the FTC's regulations are entitled to no deference. Pet. App. 19.

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[3] Indeed, the basis for this interpretation of Section 110 is even more compelling here than in *McMahon* because the statute there – unlike the Warranty Act – contained a provision that expressly prohibited parties from waiving provisions of the Act. The SEC had interpreted this non-waiver provision as prohibiting pre-dispute arbitration agreements because the SEC believed such an agreement constituted a waiver of the provisions of the Act granting injured parties the right to file a civil action. This Court rejected that argument, recognizing that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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